

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

MICHAEL CARGILL,  
Plaintiff,

vs.

WILLIAM BARR,  
IN HIS OFFICIAL CAPACITY AS  
ATTORNEY GENERAL  
OF THE UNITED STATES, ET AL,  
Defendants.

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:  
: No. 1:19-CV-00349-DAE  
: Austin, Texas  
: September 9, 2020  
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TRANSCRIPT OF BENCH TRIAL  
BEFORE THE HONORABLE DAVID A. EZRA  
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

Caleb Kruckenberg, Esquire  
Mark Chenoweth, Esquire  
New Civil Liberties Alliance  
1225 19th Street NW, Suite 450  
Washington, DC 20036  
(202)869-5217; caleb.kruckenberg@ncla.legal

FOR THE DEFENDANTS:

Eric J. Soskin, Esquire  
Matthew James Glover, Esquire  
Christopher Alan Bates, Esquire  
U.S. Department of Justice, Civil Division  
1100 L Street NW, Room 12002  
Washington, DC 20003  
(202)353-0533; eric.soskin@usdoj.gov

COURT REPORTER:

Angela M. Hailey, CSR, CRR, RPR, RMR  
Official Court Reporter, U.S.D.C.  
655 East Cesar E. Chavez Blvd., Third Floor  
San Antonio, Texas 78206  
Phone (210)244-5048  
angela\_hailey@txwd.uscourts.gov

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**I N D E X****OPENING STATEMENTS****PAGE**

By Mr. Kruckenberg

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By Mr. Glover

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By Mr. Bates

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**WITNESS:****David Smith**

By Mr. Glover

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By Mr. Soskin

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By Mr. Kruckenberg

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1 *(Wednesday, September 9, 2020, 9:07 a.m.)*

2 \* \* \*

3 COURT SECURITY OFFICER: All rise.

4 COURTROOM DEPUTY CLERK: Austin 19-CV-00349, Michael  
5 Cargill versus William Barr, et al.

6 THE COURT: Good morning to all of you. I wish we had  
7 a nicer day for you here in Austin. Are all of you from  
8 Austin?

9 MR. KRUCKENBERG: No, Your Honor.

10 THE COURT: You're from where?

11 MR. KRUCKENBERG: We are from Washington, D.C.

12 THE COURT: Okay.

13 MR. SOSKIN: We're also from Washington, D.C., Your  
14 Honor. Our witness, Mr. David Smith, is from Martinsburg, West  
15 Virginia.

16 THE COURT: Well, this isn't the best Austin has to  
17 offer, I can promise you. First of all, let's have appearances  
18 by counsel, if we can.

19 MR. KRUCKENBERG: Good morning, Your Honor. Caleb  
20 Kruckenberg from the New Civil Liberties Alliance for the  
21 plaintiff, Michael Cargill.

22 MR. CHENOWETH: Mark Chenoweth from the New Civil  
23 Liberties Alliance, also for plaintiff, Michael Cargill.

24 THE COURT: And the gentleman that's with you?

25 PLAINTIFF: Michael Cargill, Your Honor.

1 THE COURT: All right. Good morning to you folks.

2 MR. SOSKIN: Good morning, Your Honor. Eric Soskin,  
3 Civil Division, United States Department of Justice for the  
4 defendants. With me are my colleagues Christopher Bates and  
5 Matthew Glover also from the Civil Division and today we'll be  
6 joined by a witness, Mr. David Smith, of the Bureau of Alcohol,  
7 Tobacco, Firearms and Explosives.

8 THE COURT: Right. Okay, very good. Why don't you be  
9 seated. Let's go over a few preliminaries, if I can. As you  
10 know, this is not a hearing, this is the -- even though we only  
11 have one live witness, this is a trial. And because it's a  
12 trial, rather than simply a hearing where I would file a  
13 dispositive order, I'm not required to do findings of fact and  
14 conclusions of law, I can do it in an area form, but I don't do  
15 that. I've been a federal judge for I guess now 33 and some  
16 years and so it has always been my practice in nonjury  
17 proceedings in trials to do findings of fact and conclusions of  
18 law. I think it's important for the parties, it's important so  
19 that you know and understand where the Court is coming from and  
20 why I made a decision and what basis that decision rests upon.  
21 And as important, if not more important I guess from your  
22 perspective, it's very important for the Court of Appeals. A  
23 lot of judges like to obfuscate and kind of hide their ruling  
24 with these thin little orders on the theory that if you don't  
25 lay it out there in detail it makes it harder for the Court of

1 Appeals to find fault with your ruling. I don't ascribe to  
2 that principle. I've been very fortunate to have sat as a  
3 visiting judge, a designated judge on the Ninth Circuit Court  
4 of Appeals for 30 years. I do so three times a year. I'm very  
5 proud that they continue to ask me back because they don't  
6 always do that, for sure, and I hold the record actually which  
7 I understand will never be broken for the most number of  
8 designated sittings of any designated judge in the history of  
9 the Ninth Circuit since its founding. In fact, I just sat last  
10 week virtually which was an experience. Second time I've sat  
11 with them virtually and it works, but in my view it isn't as  
12 good. I like to have the lawyers in front of me. Speaking of  
13 which, this was not easy to arrange. I had to do a lot of  
14 convincing that this wouldn't be the slippery slope, so to  
15 speak, but I know that you have been waiting very patiently.  
16 We only have one witness and as such I really didn't see that  
17 the ends of justice could be further delayed. I thought we  
18 could do this safely and I think we are doing it very safely  
19 here. And it's really no different, practically speaking, than  
20 having a hearing. It would be a different story if we had a  
21 jury, we wouldn't be here if we had a jury, or if we had  
22 multiple witnesses over multiple days, that would be  
23 troublesome, but with just one witness I was able to break the  
24 ice. Now, my head still hurts from doing it, but I was able to  
25 break the ice, so here we are.

1 I have a practice, I think that Ms. Springs, my  
2 courtroom deputy, might have talked to you a little bit about  
3 it, I don't know, but I have -- you did or you didn't?

4 COURTROOM DEPUTY CLERK: I only talked to them about  
5 the exhibits.

6 THE COURT: Okay. I do not take oral closing argument  
7 in a nonjury trial, okay. Now, here is the reason. I used to  
8 be a trial lawyer, okay. And if you stand up -- in a jury  
9 trial it's a whole other story, you have to have closing  
10 argument with a jury, but in a nonjury trial which almost  
11 always tends to be a little more complex in some ways, they  
12 frequently involve the government and there's a lot of  
13 regulations and other issues going on and we have that here.  
14 The lawyers are forced at the end of the trial to try to  
15 remember and recall everything that's gone on in the case,  
16 every paper that's been filed, everything that's important and  
17 then try to give it to me in 20 minutes or half an hour, which  
18 is more time than you're going to get at the Appellate Court.  
19 You'll probably get 15 minutes, maybe 20. I don't know what  
20 the Fifth Circuit does. But it's much better in my view and  
21 much more productive for the lawyers to take stock of the  
22 testimony that has been given, go back to their offices,  
23 collaborate with their colleagues, call upon the earlier  
24 admitted evidence, not call upon the stuff that's outside the  
25 record, but call upon the admitted evidence that's in evidence

1 at the trial and to write a cohesive closing argument that  
2 creates a true picture of what they are attempting to say with  
3 appropriate backup.

4 I've never had a lawyer in the entire history of my  
5 doing this, and I've done it since I began, who has told me  
6 that they didn't think it was a better way to go. I've tried  
7 to convince my colleagues, some of them I've been successful in  
8 convincing to do this and they've been very happy doing it, but  
9 others I think they feel it's just a lot of extra work for them  
10 actually because then they have to wade through this stuff,  
11 it's just easier to have somebody talk to you. But you will be  
12 given 10 days, which is plenty of time, to get your closing  
13 argument in. And the closing argument can be no more than 20  
14 pages, okay. And that doesn't mean 20 pages and then 15 pages  
15 of footnotes, okay. That means 20 pages. And that would be  
16 the equivalent of an oral closing argument and you can make  
17 your arguments there, you can cite to the record and make your  
18 points and they will be, I can assure you, carefully read and  
19 considered by me. And it also is very helpful for me to when  
20 I'm doing my findings of fact and conclusions of law to have in  
21 front of me your closing argument so I can focus back and look  
22 at them and say, well, let me remember, is this their position  
23 or this isn't their position. I can look back, then I know for  
24 sure, I don't have to worry about it. Now, are there any  
25 objections to doing it that way?

1 MR. KRUCKENBERG: No, Your Honor.

2 MR. SOSKIN: No, Your Honor. Although I would request  
3 that we be permitted to consult our schedules. I have another  
4 one of your colleagues on the bench, I have previously asked to  
5 reset a deadline that coincided with today's date.

6 THE COURT: Judge Pitman?

7 MR. SOSKIN: It was Judge O'Connor over in the  
8 Northern District of Texas.

9 THE COURT: Judge Reed O'Connor?

10 MR. SOSKIN: Yes.

11 THE COURT: He's a good judge, by the way.

12 MR. SOSKIN: Absolutely. After you scheduled this  
13 date, he then set a briefing schedule that would also have  
14 concluded on this date and I believe he set 10 days from now as  
15 my new deadline.

16 THE COURT: Brilliant minds think alike, 10 days.

17 MR. SOSKIN: So if we could have --

18 THE COURT: Here is what I'll do for you, all right,  
19 it's not like we're all going someplace with COVID-19, I'll  
20 give you 20 days. That should give you -- whatever is going on  
21 with Judge O'Connor you should be able -- and you're not by  
22 yourself either, you have colleagues.

23 MR. SOSKIN: Thank you, Your Honor. This is not a  
24 take-home exam where only you have to work on it. You're  
25 writing for your client, so anybody in your team is entitled to



1 chime in or write a part of it. This is another reason why I  
2 do this because you can consult with one another. I want your  
3 true position. You know, it's not one of these things where  
4 you're giving a closing argument and somebody is over there and  
5 they're sweating bullets and they've got a piece of paper and  
6 they run up to you and hand you the paper. Who hasn't had that  
7 happen? Certainly happened to me more than once. So you can  
8 all collaborate.

9 COURTROOM DEPUTY CLERK: September 29th.

10 THE COURT: September 29th, so I'll give you until the  
11 magic day of -- what is October 1st? Is that a weekday?

12 COURTROOM DEPUTY CLERK: October 1st is a weekday.

13 THE COURT: October 1st. Look how generous I am.  
14 See?

15 MR. SOSKIN: Thank you, Your Honor, I appreciate.

16 THE COURT: I'm a real mensch, I'm telling you, in my  
17 own mind of course. All right, that's good for a Catholic boy.  
18 All right, one thing I will allow you to do, however, is make a  
19 short opening statement. All right, you can make your opening  
20 statement and make it short please, no more than five or ten  
21 minutes and then we'll go right into the witnesses. I'm going  
22 to pre-admit exhibits. Have you provided them all to  
23 Ms. Springs?

24 MR. KRUCKENBERG: Yes, Your Honor.

25 THE COURT: Are there any objections to any of those

1 exhibits?

2 MR. SOSKIN: No objections.

3 MR. KRUCKENBERG: No objections.

4 THE COURT: They'll all be pre-admitted at this time.

5 MR. GLOVER: Your Honor, we would also move for our  
6 exhibits to be admitted, but would caution that Exhibit Two is  
7 demonstrative only.

8 THE COURT: Okay. I was admitting all the exhibits.

9 MR. GLOVER: My apologies.

10 THE COURT: I wasn't just admitting theirs. So I'll  
11 admit all of them for all purposes with the exception of  
12 Government's Exhibit Number Two which will be received, not  
13 admitted, for demonstrative purposes. So it will be on the  
14 record, but it won't be evidence.

15 MR. GLOVER: Thank you, Your Honor.

16 THE COURT: Except for the testimony that might flow  
17 from it. All right, I'll hear from the plaintiff please.

18 MR. KRUCKENBERG: Thank you, Your Honor.

19 THE COURT: Re-announce your name please.

20 MR. KRUCKENBERG: Yes, Your Honor. Good morning  
21 again. My name is Caleb Kruckenberg and I'm here from New  
22 Civil Liberties Alliance for Mr. Cargill. And Your Honor,  
23 before I get into the details of the opening argument, I did  
24 want to alert the Court there was a development in a similar  
25 case, Aposhian versus Barr in the Tenth Circuit Court of

1 Appeals.

2 THE COURT: I am aware of those cases.

3 MR. KRUCKENBERG: Just so Your Honor is aware, the  
4 Tenth Circuit granted en banc review of that case on Friday.

5 THE COURT: I did not know that.

6 MR. KRUCKENBERG: And so I wanted to make sure that  
7 Your Honor was aware.

8 THE COURT: I believe the Tenth Circuit case is the  
9 one that went up to the Supreme Court.

10 MR. SOSKIN: That was the D.C. Circuit.

11 THE COURT: Was that the D.C. Circuit one? Where  
12 Justice Gorsuch made kind of an ad hominem comment.

13 MR. KRUCKENBERG: Your Honor, that was the D.C.  
14 Circuit's case. And the Tenth Circuit I'm letting you know on  
15 Friday is now rehearing that case and, so you're aware, I'm  
16 counsel in that case also.

17 THE COURT: When are you going to rehear it?

18 MR. KRUCKENBERG: We have 30 additional days to brief  
19 it and then we'll see when the Court grants argument.

20 THE COURT: Okay. But there's no rehearing in the  
21 D.C. case obviously.

22 MR. KRUCKENBERG: Correct. None that I'm aware of.

23 THE COURT: Right. All right. You can proceed.

24 MR. KRUCKENBERG: Thank you, Your Honor. Your Honor,  
25 ATF was correct when it determined after conducting a physical

1 examination and test firing of the Slide Fire bump-stock that  
2 it was not a regulated firearm under the Gun Control Act or the  
3 National Firearms Act and that is consistent with the statutory  
4 definition that Congress set down, because a machine gun is a  
5 weapon that fires multiple shots from a single function of the  
6 trigger. And a bump-stock simply doesn't operate in that  
7 fashion. A bump-stock requires an independent action of the  
8 trigger for every shot. And that's something that's not in  
9 dispute and hopefully, Your Honor, today --

10 THE COURT: Let me ask you this. When you say an  
11 independent action -- I'm not totally unfamiliar with firearms.  
12 I was in the Marine Corps at one point, I was an Army officer,  
13 I was in the Military Police Corps as a commissioned officer in  
14 the Military Police Corps, so I've handled a lot of weapons,  
15 I've fired a lot of weapons, I've fired semi-automatic weapons,  
16 I've fired fully automatic weapons, M16 machine guns and so  
17 forth which were the machine gun of choice in the day. And my  
18 understanding, and you and opposing counsel can correct me if  
19 I'm wrong, I have never had any personal experience whatsoever  
20 with bump-stocks. I want to make that clear on the record,  
21 none. I don't own one, I don't know anybody who does, I've  
22 never seen one personally. I did see one on television after  
23 the Las Vegas shooting, but I didn't pay a lot of attention to  
24 it, the gun. I was more concerned about the victims. And so I  
25 don't have a lot of personal experience with bump-stocks, I

1 don't know a lot about them except what I've read here in this  
2 case. At least my understanding -- obviously with a fully  
3 automatic weapon like an M16 machine gun which was the Army's,  
4 I don't know that they still have them, I presume they have  
5 them in some form, you would take the gun, those were usually  
6 on a tripod, and you would pull the trigger and just constantly  
7 hold the trigger and it would feed a belt of rounds into the  
8 chamber which would then automatically by operation of the gas,  
9 and we don't need to get into the details, would fire at a  
10 pretty significant rate round after round. My understanding of  
11 the bump-stock is that the finger is placed on the trigger and  
12 you simply hold your finger on the trigger and that the stock  
13 operates in some way or fashion because of the recoil to  
14 accelerate a round -- another round into the chamber. It's not  
15 so much a feeding mechanism which is built into the weapon. Am  
16 I correct there or wrong?

17 MR. KRUCKENBERG: Your Honor --

18 THE COURT: You don't take your finger off and keep  
19 pushing your finger, otherwise it would still be a  
20 semi-automatic weapon.

21 MR. KRUCKENBERG: Well, that's not exactly correct.

22 THE COURT: You tell me, that's why I'm asking.

23 MR. KRUCKENBERG: Yes, Your Honor. We will show a  
24 video and that's one of our exhibits that hopefully can shed  
25 some light on this. But the operation of a bump-stock is

1 essentially what you do is you put your shooting finger, the  
2 trigger finger on a ledge on the bump-stock and it separates  
3 from the trigger mechanism itself.

4 THE COURT: It's not on the trigger itself.

5 MR. KRUCKENBERG: It is not on the trigger itself.  
6 And the shooter puts his non-shooting hand on the front of the  
7 weapon and pushes forward while also pulling backward with the  
8 trigger finger against the ledge. And when the shooter pushes  
9 forward, the trigger touches the finger and the mechanism is  
10 engaged. Then it fires a round. Then it chambers another  
11 round. And the recoil pushes it back into the shooter's arm,  
12 it slides, the finger comes off the trigger and then pushes it  
13 again into the trigger. And so what happens is you create the  
14 separation from the trigger finger, the actual trigger lever.

15 THE COURT: The trigger finger doesn't move.

16 MR. KRUCKENBERG: Correct.

17 THE COURT: The trigger finger stays on the -- on this  
18 holder.

19 MR. KRUCKENBERG: Correct.

20 THE COURT: I don't know what you would call it. It's  
21 not a trigger, but it's some sort of --

22 MR. KRUCKENBERG: I think they refer to it as the  
23 trigger ledge.

24 THE COURT: Trigger ledge?

25 MR. KRUCKENBERG: Yes.

1 THE COURT: So it stays on the trigger ledge and the  
2 left arm stays up and grips the underside of the barrel, the  
3 barrel housing.

4 MR. KRUCKENBERG: Yes.

5 THE COURT: Whatever that might be, plastic, wood,  
6 whatever it is, and pushes that forward and then rounds are  
7 automatically fed into the chamber after the first shot.  
8 What -- I hate to use the word "trigger", but what triggers the  
9 first shot?

10 MR. KRUCKENBERG: What triggers the first shot is that  
11 the shooter pushes forward with the non-trigger hand, the left  
12 hand.

13 THE COURT: So the left hand becomes in effect the  
14 substitute for the trigger finger.

15 MR. KRUCKENBERG: In a sense because you push forward  
16 until you make contact with the trigger level.

17 THE COURT: And as long as the person is pushing  
18 forward and as long as you have rounds in the magazine or in a  
19 belt or whatever it happens to be, that weapon is going to fire  
20 continuously.

21 MR. KRUCKENBERG: Not exactly. And the reason it  
22 doesn't fire continuously is you have to push forward with the  
23 non-shooting hand. You also have to continuously pull back.  
24 And the bump-stock itself has to slide back and forth because  
25 the mechanism, the shooting mechanism doesn't change. So you

1 have to create separation with your trigger finger and the  
2 trigger ledge for every shot, so what happens is you sort of  
3 push it forward, push it into the trigger finger, the recoil  
4 pushes it backward so that then the trigger can reset. That's  
5 when the new round is chambered and then you push forward again  
6 to hit the trigger again. So it is very rapid, it's a rapid  
7 movement, but what you're actually doing is pushing the stock  
8 forward continuously to keep the trigger ledge hitting your  
9 trigger finger.

10 THE COURT: So you don't keep your hand forward  
11 constantly and it just keeps firing, you have to pull it --  
12 pull your hand back? Is that what you're saying? Is it like a  
13 pump shotgun?

14 MR. KRUCKENBERG: No, Your Honor, and it's more  
15 like -- like I said, we can watch the video to see it in  
16 action.

17 THE COURT: All right.

18 MR. KRUCKENBERG: But essentially you have to  
19 continuously push forward and continuously pull back, but the  
20 weapon moves a considerable amount.

21 THE COURT: Right.

22 MR. KRUCKENBERG: And that's why I say it's hard to  
23 classify as either this one single movement or this one  
24 deliberate movement. What happens is the weapon bounces back  
25 and forth and you have to keep pushing forward to keep



1 directing the weapon back into your trigger finger.

2 THE COURT: Well, okay. I fired a Thompson submachine  
3 gun before while I was in the service actually and that  
4 certainly is an automatic weapon.

5 MR. KRUCKENBERG: Yes.

6 THE COURT: I mean it can be fired semi-automatically,  
7 but it's an automatic weapon, 45 caliber. And there's a heck  
8 of a lot of recoil and that thing moves back and forth too,  
9 believe me, I had a sore shoulder. I used to admire these  
10 World War II soldiers who used to carry these things. I don't  
11 know how they did it. I guess they developed -- I don't know  
12 whether they developed a callous or what they developed, but it  
13 was something to hold on to that Thompson for somebody who  
14 wasn't familiar with it because there was a tremendous amount  
15 of recoil from my remembrance and that was also true for  
16 B.A.R., Browning Automatic Rifle which I also fired and that  
17 had a capacity to fire automatically and that thing had a  
18 tremendous amount of recoil and that weapon moved back and  
19 forth a lot, although my finger remained on the trigger.

20 MR. KRUCKENBERG: Right.

21 THE COURT: Okay. I understand what you're saying.  
22 Why don't we go forward. Thank you for the explanation. If  
23 there was any incorrect, I'm sure we'll hear from counsel to  
24 tell me that that wasn't correct.

25 MR. KRUCKENBERG: And Your Honor, just moving forward

1 to the arguments. As we've laid out in our trial brief and  
2 also our proposed findings of fact and conclusions of law --

3 THE COURT: I've read all of those. Everything is  
4 here.

5 MR. KRUCKENBERG: Yes, Your Honor. And we believe  
6 there's six reasons why the bump-stock regulation is invalid.  
7 And the first I think is something that has been  
8 underemphasized by the other courts that have considered this  
9 issue and that's the fact that the ATF agrees that it lacks the  
10 ability to issue any legislative rules in this space. And this  
11 once again was in the trial brief with the government here,  
12 they agreed that ATF cannot publish a substantive regulation  
13 that changes the definition of a bump-stock. And that, Your  
14 Honor, should really end the discussion regardless of how a  
15 bump-stock operates, because as every court that's considered  
16 this issue, the rule we're talking about here is a legislative  
17 rule. It speaks with the force of law, it is a substantive  
18 amendment to the statute and the statutory definition. But ATF  
19 agrees they don't have that authority. What the ATF has argued  
20 instead is that this is merely an interpretive rule that  
21 represents the best interpretation of what the statute has  
22 always meant. And Your Honor, we believe that that is  
23 incorrect as the easiest example of that is ATF itself has said  
24 for years that bump-stocks were not machine guns and it is very  
25 inconsistent of the government to say now that bump-stocks have

1 always been machine guns, that is always the best  
2 interpretation of the statute and we are merely repeating what  
3 we all know to be true. And Your Honor, that is the ATF's  
4 position today. Even moving on from that, even if we assume  
5 that the ATF has legislative rule making authority, they don't  
6 have any authority to issue this regulation here because this  
7 statutory definition of a machine gun is not ambiguous. This  
8 is also a point that the other courts I think have sort of  
9 skipped past. And the ATF has argued and the United States  
10 Department of Justice has argued for years in criminal  
11 prosecutions that the statutory definition of a machine gun is  
12 unambiguous, everyone knows what it means. And specifically  
13 they have argued that the terms we're discussing today,  
14 "automatically" and "single function of a trigger" are so  
15 readily understood and so unambiguous that they can criminally  
16 prosecute people for violating them with innovative devices.  
17 But what that means is if the statute is unambiguous, then the  
18 agency has no authority to try to fill in a gap in the statute  
19 because we all know what the statute means because the statute  
20 is clear. And for that reason as well, the regulation is  
21 invalid because you can't fill a statute if it's already  
22 unambiguous.

23 Now, third, we've argued that or the ATF has argued  
24 that this is the best interpretation of the statute, that's  
25 their position today. But that cannot be right. As I

1 mentioned, there are 24 different classification rulings from  
2 the ATF, classification letters, that have considered  
3 bump-stocks that are just like the Slide Fire which is at issue  
4 today and have said those are not machine guns. And  
5 specifically they issued a classification letter for the Slide  
6 Fire. They said it is not a machine gun under the statutory  
7 definition. And clearly the ATF has not filed that it was  
8 always a machine gun.

9 THE COURT: What is a Slide Fire? I'm sorry, I've  
10 never heard that term.

11 MR. KRUCKENBERG: That is the bump-stock that we're  
12 discussing today.

13 THE COURT: The commercial name of it.

14 MR. KRUCKENBERG: Yes, sir.

15 THE COURT: I thought you were talking about some  
16 other type of weapon --

17 MR. KRUCKENBERG: No, Your Honor.

18 THE COURT: -- that the ATF passed on that was --  
19 okay.

20 MR. KRUCKENBERG: The Slide Fire is perhaps the best  
21 known of the commercially available bump-stocks.

22 THE COURT: I told you, I don't have any converse with  
23 bump-stocks.

24 MR. KRUCKENBERG: Yes, Your Honor. And I'll also  
25 point out that as we know from the administrative record, when

1 the ATF was considering this regulation they looked and there  
2 had never been a criminal prosecution in the United States for  
3 possession of a bump-stock under 922(o), which is the criminal  
4 prohibition on machine guns. And it's very clear at that point  
5 in 2017 that no one thought that bump-stocks were machine guns  
6 and certainly not the United States Department of Justice. And  
7 it is simply incredible and inconsistent for them to say -- to  
8 come in today and say that was always the meaning of the term.  
9 And I'll also point out there's a very serious complication if  
10 their view of the statute is correct. What that would mean is  
11 that anyone who purchased a bump-stock, and they've estimated  
12 there are about 500,000 different people who have done this,  
13 anyone who purchased a bump-stock lawfully or with the ATF's  
14 approval --

15 THE COURT: You mean before this rule.

16 MR. KRUCKENBERG: Before this rule went into effect,  
17 still had violated section 922(o), because despite their advice  
18 from the ATF, the device was still a machine gun, that's the  
19 position they're taking today, and they would be subject to  
20 criminal prosecution. That includes my client, Mr. Cargill,  
21 because he purchased the Slide Fire with the understanding that  
22 it had been approved by the ATF in the classification letter.  
23 But unfortunately, their position now is that it was still a  
24 machine gun all along subject to criminal penalties. And I  
25 don't think that that is a theoretical concern. I think there

1 is a real concern that some of that half million people out  
2 there who bought these devices could be subject to prosecution.

3 THE COURT: Have there been any prosecutions?

4 MR. KRUCKENBERG: Not that I'm aware of.

5 THE COURT: There's a Supreme Court case directly on  
6 point talking about, you know, worrying about something where  
7 nobody has been prosecuted and that was in the contraceptive  
8 context.

9 MR. KRUCKENBERG: Yes, Your Honor. I think what I am  
10 trying to get at is that the government's position here  
11 today -- and I'm not saying that there isn't active threat of  
12 prosecution. What I am saying is their position today is that  
13 my client committed a federal crime when he bought a bump-stock  
14 despite the approval letter and that he should have known  
15 better. That's their position today and I think that is very  
16 troubling and it's a troubling position for the Department of  
17 Justice to take.

18 To our fourth point, I would say that even if we  
19 consider that this is a valid agency action, valid rule making,  
20 even under the deferential test for agency action, it's an  
21 unreasonable interpretation and that goes back to the arguments  
22 that I made before.

23 Switching slightly, this is also an arbitrary and  
24 capricious action by the agency. This was clearly a political  
25 decision, not a technical decision. And the acting director of

1 the ATF at the time this rule was issued said very clearly we  
2 went outside or DOJ went out to us and they said it doesn't  
3 matter what the technical experts within the Department say,  
4 you need to change the interpretation of bump-stocks, you need  
5 to make these unlawful. And that is not what the agency should  
6 be doing. The agency should be relying on its own expertise  
7 and the expertise of its technical experts, its firearms  
8 examiners.

9 And finally, Your Honor, if the agency, if the agency  
10 can do what it did here, if this bump-stock ruling is valid,  
11 then it is a delegation issue, it violates the non-delegation  
12 clause because this would allow the ATF, a criminal prosecutor,  
13 to change the subsequent scope of criminal law and to declare  
14 people into felons because they have followed the ATF's own  
15 advice. And for those six independent reasons, this regulation  
16 is invalid.

17 And Your Honor, I would just like to -- we have sort  
18 of an interesting presentation today because there aren't any  
19 witnesses and we have a limited -- other than Mr. Smith, and we  
20 have a limited number of exhibits and so I want to just walk  
21 through our exhibits to show parts of the administrative record  
22 that I think are very helpful and informative and also, as you  
23 mentioned, to show the video so that we can all sort of get on  
24 the same page and understand the way this device works. So I'd  
25 like to first turn to Plaintiff's Exhibit One.

1 THE COURT: Are you going to go through every exhibit?  
2 We'll be here all day.

3 MR. KRUCKENBERG: There are 12 exhibits, Your Honor.

4 THE COURT: Well, I'd rather have you go over the  
5 exhibits as we go through them with the witnesses.

6 MR. KRUCKENBERG: I certainly can do that.

7 THE COURT: Let's do that because we only have a  
8 limited amount of time. That was my promise and my agreement  
9 with counsel.

10 MR. KRUCKENBERG: Yes, certainly. So what we can do  
11 then, Your Honor, given the time constraints, I think Mr. Smith  
12 is probably the best witness to talk about -- I mean he's the  
13 witness and he's the best person to talk about the way this  
14 device functions which I think is really what you're most  
15 concerned with.

16 THE COURT: It's not what I'm most concerned with, but  
17 I certainly am concerned about it because that makes a big  
18 difference.

19 MR. KRUCKENBERG: I understand, it's the premise for  
20 why we're here, so I think perhaps the best thing for us to do  
21 then is we can have the government call Mr. Smith. I think  
22 they have a presentation with him, I have a video that I'd like  
23 to discuss with him as one of our exhibits and I think perhaps  
24 we can go from there.

25 THE COURT: I'm anticipating that we'll be done before



1 noon and I would assume that would be the case. Let me have  
2 opening statement if you'd like by the government.

3 MR. GLOVER: Good morning. May it please the Court,  
4 Matthew Glover for the United States.

5 THE COURT: Good morning.

6 MR. GLOVER: Thank you for accommodating our schedule,  
7 Your Honor, we really appreciate that. This morning I'm going  
8 to be calling Mr. Smith and going through his CV. He's a  
9 firearms enforcement officer in the Firearms and Ammunition  
10 Technology Division of the Bureau of Alcohol, Tobacco, Firearms  
11 and explosives in Martinsburg, West Virginia. We'll seek to  
12 qualify him as an expert in the field of firearm mechanics and  
13 operations. Mr. Soskin is going to go through a presentation  
14 with Mr. Smith about the mechanics and the operations of a  
15 bump-stock of an automatic firearm and of a semi-automatic  
16 firearm. That presentation is going to underlie the  
17 administrative record in this case and give you some technical  
18 background and bring the administrative record to life for you,  
19 we hope.

20 Following Mr. Soskin's testimony, we anticipated,  
21 based on the scheduling discussion that we had, I believe it  
22 was in February when Mr. Soskin and I were down here and  
23 Mr. Kruckenberg, that there would be brief arguments by each  
24 side after Mr. Kruckenberg has had an opportunity to go through  
25 his exhibits with Mr. Smith.

1 THE COURT: Brief argument about what? Refresh me.

2 MR. GLOVER: The legal questions.

3 THE COURT: But that's what we're doing in -- that's  
4 your closing argument.

5 MR. GLOVER: Our understanding had been that given  
6 that this was an administrative record case that we were having  
7 sort of unique bump trial on, that there would be brief sort of  
8 the equivalent of summary judgment argument, that's what we  
9 prepared for, but I apologize --

10 THE COURT: Well, I'll give you a few minutes at the  
11 end, yes, if you want to hone the issues, but remember now your  
12 closing argument is going to be in writing.

13 MR. GLOVER: Absolutely. Okay. So I think what the  
14 arguments are going to show is that the crux of the matter is  
15 whether a bump-stock meets the definition for a machine gun in  
16 the federal statute and that Mr. Smith's presentation and our  
17 arguments about that are going to show that the rule correctly  
18 defines and describes the statutory terms in machine gun  
19 including automatically and single function of the trigger. In  
20 that context, the accurate rule finds that bump-stock is a  
21 machine gun because in accordance with the plain meaning of  
22 those terms, "automatically" and "single function of the  
23 trigger", the bump-stock allows the shooter once it initiates  
24 the firing sequence which my colleague was discussing with you  
25 by placing the finger on the trigger ledge and applying forward

1 pressure, continual forward pressure will allow the gun, as the  
2 Court said, to fire until you run out of ammunition or until  
3 the shooter voluntarily ceases to place forward pressure on the  
4 firearm.

5 As to a few of the other points that were made, the  
6 bump-stock rule is an interpretive rule. The rule says plainly  
7 on its face that it is interpreting the definition of machine  
8 gun in the statute, its sole goal is to give that  
9 interpretation and to explain to the public that prior  
10 classifications of bump-stocks were erroneous and withdraw  
11 those classifications.

12 Similarly, Chevron deference has no place in this case  
13 both because neither party suggested applies and because this  
14 is an interpretive rule. And my colleague, Mr. Bates, is going  
15 to briefly give an opening on the arbitrary and capricious  
16 comments if that's all right.

17 THE COURT: Yes.

18 MR. BATES: Thank you, Your Honor. Christopher Bates  
19 for defendants. Just very briefly on the plaintiff's claims  
20 the rule is arbitrary and capricious under the Administrative  
21 Procedure Act. Plaintiff basically identifies three reasons  
22 why he claims the rule is arbitrary and capricious. First,  
23 because it reflects allegedly improper influence from elected  
24 officials. Second, that it fails to adequately explain the  
25 agency's reasons for changing its view. And third, that it

1 failed to consider the agency -- sorry, the evidence before the  
2 agency. Plaintiff is wrong on each of these counts.

3 As to influence from elected officials, agencies are  
4 allowed to take into account the views of the President,  
5 members of Congress and other administration officials.  
6 Nothing requires ATF to wall itself off from the world. And  
7 ATF operates under delegation from the Attorney General. The  
8 statutes provide authority to administer these firearms  
9 statutes to the Attorney General, which the Attorney General  
10 has then delegated to ATF, so it's entirely proper for ATF to  
11 consult with Department of Justice administering rules and  
12 regulation related to enforcement of firearms statutes.

13 As to ATF's reasons for changing its views, the agency  
14 set forth these reasons at length and the rule explained how  
15 the prior classification decisions with regard to bump-stocks  
16 did not provide consistent or extensive legal analysis of the  
17 term "automatically" and contained inconsistent explanations  
18 about why the devices were or were not bump-stocks.

19 And it also explained that the prior classification  
20 decisions had relied on a mistaken premise that the need for  
21 shooter input or making pressure with the non-shooting arm  
22 rendered the firearm from bump-stock devices nonautomatic.

23 And as to the evidence before the agency, ATF had in  
24 its possession the results of the tests that it had done in the  
25 past as well as information regarding the device's mechanical

1 operation. There's no reason for ATF to have to redo the tests  
2 that it had previously performed when it had before it all the  
3 information it needed for classification decisions and what had  
4 changed was the agency's reading the statute or the agency's  
5 legal analysis. Because the bump-stock rule presents the best  
6 interpretation of statutory text which is promulgated pursuant  
7 to valid authority and complies with procedural requirements,  
8 this Court should enter judgment for the government.

9 THE COURT: Okay. We're going to take a very, very  
10 short recess. Anybody who needs to use the restroom do so, we  
11 will come back and get right into our witness.

12 (9:48 a.m.)

13 \* \* \*

14 (9:58 a.m.)

15 THE COURT: I was reminded during the recess that I  
16 have an appointment at 11:45, so I don't want to rush counsel  
17 through this, so if we aren't done by 11:45, then we'll just  
18 break at that time and probably resume at 1:30. I think we  
19 should be done, but if we're not, I'm not going -- we're here,  
20 let's finish it.

21 One thing I want defense counsel to be thinking of  
22 which really is a little bit unclear in your briefing, I  
23 noticed it and so did my law clerk when he was going through it  
24 and that is what is your thought about what the consequences if  
25 we found that this was a legislative rule and not an

1 interpretive rule, what would you ask the Court to do at that  
2 point or what do you believe the remedy would be at that point?  
3 You should be thinking about that as well. All right. I'm  
4 talking to plaintiff's counsel. So plaintiff has no witnesses  
5 today, am I correct?

6 MR. KRUCKENBERG: Yes, sir.

7 THE COURT: In a normal trial I would call on you, so  
8 you have no witnesses, so you pass to the defense.

9 MR. KRUCKENBERG: That is correct, Your Honor.

10 THE COURT: So counsel, you may call your witness.

11 MR. GLOVER: Thank you, Your Honor. The government  
12 calls Mr. David Smith.

13 COURTROOM DEPUTY CLERK: Please raise your right hand.

14 \* \* \*

15 *(DAVID SMITH, Government Witness, Sworn.)*

16 \* \* \*

17 THE WITNESS: I do.

18 THE COURT: Mr. Smith, you're sitting in the jury box  
19 only because we're trying to protect you and everybody else.  
20 We're doing appropriate social distancing. Normally you  
21 wouldn't be in the jury box, but I don't want you to think that  
22 your testimony is somehow different or less important or that  
23 your oath is any less important simply because you're sitting  
24 there versus here. We're only doing it because of COVID-19.

25 THE WITNESS: Thank you, sir.

1 THE COURT: You may proceed.

2 MR. GLOVER: Thank you, Your Honor.

3 EXAMINATION

4 BY MR. GLOVER:

5 Q. Mr. Smith, good morning. I'm going to show you a document  
6 that's been previously admitted as Government Exhibit One.

7 MR. GLOVER: Your Honor, does he have a screen there?

8 THE COURT: I think he does. Can you see anything  
9 there, Mr. Smith?

10 COURTROOM DEPUTY CLERK: They're not projecting  
11 anything.

12 THE COURT: Put something up so he can see it. Now  
13 can you see anything?

14 THE WITNESS: Yes, sir.

15 THE COURT: He's got it.

16 BY MR. GLOVER:

17 Q. Mr. Smith, do you recognize the document that's just been  
18 published to you?

19 A. Yes, it is my curriculum vitae.

20 Q. And did you create this document?

21 A. Yes, I did.

22 Q. And this is a true and accurate representation of that?

23 A. Yes, it is.

24 Q. Mr. Smith, what is your current occupation?

25 A. I'm a firearms enforcement officer for the Bureau of

1 Alcohol, Tobacco, Firearms and Explosives.

2 Q. How long have you been with the Bureau of Alcohol, Tobacco,  
3 Firearms and Explosive?

4 A. A little over four years.

5 THE COURT: Excuse me. Are you an enrolled agent in  
6 ATF?

7 THE WITNESS: I am not a badged agent, sir.

8 THE COURT: You're not, so Mr. Smith is the correct --

9 THE WITNESS: That is correct.

10 THE COURT: I wanted to be sure we weren't giving you  
11 a misnomer.

12 BY MR. GLOVER:

13 Q. Do you mind being referred to as Mr. Smith?

14 A. No.

15 Q. For formality that's all right?

16 A. Yes, sir.

17 Q. Mr. Smith, I'd like to step back from prior to your ATF  
18 experience. Were you in the military?

19 A. Yes, I was in the United States Marine Corps.

20 Q. And what years did you serve in the Marine Corps?

21 A. I served from 1999 to 2007.

22 Q. And what rank did you exit active duty service?

23 A. I left active duty service as an E5 Sergeant.

24 Q. What jobs I believe they're referred to as military  
25 occupation specialties did you have in the Marine Corps?



1 A. I served as a 2111, which is an armorer, and as a 2112,  
2 which is a precision weapons technician.

3 Q. Could you describe the role of a 2111 armorer?

4 A. As a 2111 armorer, I was responsible for maintaining all  
5 the weapon systems of the United States Marine Corps, also  
6 doing training as far as new armorers coming to the battalions  
7 that I was working with and performing all the QC checks, etc.,  
8 on those weapons.

9 Q. What type of checks was that?

10 A. Quality control checks.

11 Q. And could you describe your work as a precision weapons  
12 specialist, a 2112?

13 A. As a 2112 precision weapon specialist, I performed the same  
14 maintenance and quality checks on match weapons for the United  
15 States Marine Corps. In particular I ended up working in  
16 Sniper Section where I did prototype and development of sniper  
17 systems for the United States Marine Corps.

18 Q. And what types of firearms did you work with in those  
19 positions?

20 A. I worked with everything in the inventory of man portable  
21 firearms for the United States Marine Corps.

22 Q. Did you assemble and disassemble firearms from those  
23 positions?

24 A. Yes, I did.

25 Q. What types of firearms?

1 A. M9 pistols, MP5 submachine guns, M4s, M16s, 240 machine  
2 guns, 249 machine guns, small rocket launchers, dragon rocket  
3 launchers, small artillery, Howitzer pieces.

4 Q. For those of us that are not as familiar with military  
5 weaponry, that includes, among the things you listed,  
6 semi-automatic firearms and automatic firearms?

7 A. Yes, it does.

8 Q. Did you repair firearms in your time in the Marine Corps?

9 A. Yes, I did.

10 Q. What types of firearms did you repair?

11 A. I repaired semi-automatic and full automatic firearms,  
12 everything again from the M9 pistol up to small Howitzers and  
13 artillery pieces.

14 Q. What size military unit were you responsible for repairing  
15 firearms.

16 A. As armory chief for First Battalion 8th Marines, I was  
17 responsible for all the weapons under First Battalion 8th  
18 Marines. As armory chief for second amphibious assault  
19 vehicles, I was responsible for not only first -- sorry, the  
20 amphibious assault vehicle battalion, but I ended up being  
21 responsible during Operation Iraqi Freedom for two other  
22 battalions as well.

23 Q. Did you construct or modify firearms or their components?

24 A. Yes. While I was stationed at weapons training battalion  
25 as a 2112, I actually built prototype firearms from blocks of

1 steel and aluminum from the scratch up.

2 Q. What did you do after you left the Marine Corps?

3 A. When I left the Marine Corps, I went to work for Bill  
4 Wiseman and Company.

5 Q. What is Bill Wiseman and Company?

6 A. He is a private firearm manufacturer who makes ammunition  
7 test pictures and barrels for the ammunition industry and also  
8 produces high-end safari guns.

9 Q. And could you describe your personal work, what work you  
10 were doing at Bill Wiseman?

11 A. My personal work was managing the shop floor, running the  
12 machines for manufacturing barrels, manufacturing fixtures,  
13 receivers for firearms, repairing firearms brought in by  
14 customers and doing any fabrication necessary for his custom  
15 firearms.

16 Q. And for the layman, when you talk about manufacturing  
17 components and you've talked about repairing them, you were  
18 constructing firearms as well as repairing them, is that an  
19 accurate --

20 A. Yes, we were actually building and machining our own  
21 receivers as well as barrels and assembling those on custom-fit  
22 stocks.

23 Q. And as part of that, you had to assemble and disassemble  
24 firearms?

25 A. Yes, I did.

1 Q. How long were you with Bill Wiseman and Company?

2 A. I was there for a little over six months.

3 Q. And what did you do after leaving Bill Wiseman and Company?

4 A. I went back to school and got a computer aided drafting and  
5 design degree.

6 Q. And then did you join the Department of Homeland Security  
7 Immigrations and Custom Enforcement?

8 A. Yes, I did.

9 Q. And what was your job position with ICE or DHS?

10 A. I was an ordinance equipment expert.

11 Q. What period of service did you have with ICE?

12 A. From 2010 until 2016.

13 Q. And can you describe the role of an equipment specialist  
14 ordinance, is that correct?

15 A. Ordinance equipment specialist. That's fine. My role  
16 there was multifaceted. I was initially stationed out at the  
17 Firearms Law Enforcement Training Center in Artesia, New  
18 Mexico. Part of my duties was instruction on firearms to  
19 students coming through the Academy. I was also responsible  
20 for maintaining all the firearms there at the Academy. And I  
21 was responsible for working on prototype and development  
22 firearms for BORTAC which was down in El Paso at that point in  
23 time.

24 Q. Is it fair to say that in ordinance equipment specialist,  
25 the equipment you were working with was firearms?

1 A. Yes.

2 Q. What types of firearms did you work with in that position?

3 A. I worked with everything from personal duty firearms,  
4 handguns, shotguns, semi-automatic rifles, full automatic  
5 rifles to competition weapons and sniper rifles.

6 Q. In an average week at ICE, how many firearms would you have  
7 been working with?

8 A. Normally over 100.

9 Q. And did you analyze the mechanics and operations of the  
10 firearms in your job at ICE?

11 A. Yes, I did.

12 Q. Did you assemble and disassemble firearms?

13 A. Yes, I did.

14 Q. And did you repair them?

15 A. Yes, I did.

16 Q. And I think you already said this, so just to make sure  
17 I've got the testimony correct, but you also constructed them  
18 or would it be fair to say built them from scratch?

19 A. Yes, I also built prototypes.

20 Q. And after completing your time with ICE, that's when you  
21 joined your Alcohol, Tobacco, Firearms, Explosives in your  
22 current position?

23 A. Yes, I joined ATF in 2016.

24 Q. What are your primary responsibilities at ATF?

25 A. My primary responsibility under ATF is to classify firearms

1 devices submitted to ATF under the federal rules and  
2 regulations.

3 Q. What goes into classifying firearms?

4 A. When a device is submitted to me for classification, I do  
5 research first to find out a history of similar types of  
6 devices. I search the U.S. Patent website to see if there are  
7 any patents associated with this device. I look at firearms  
8 history of similar mechanical operating systems. And then, of  
9 course, I apply the rules, laws and regulations to how that  
10 device fits under federal law.

11 Q. Do you assemble or disassemble firearms when you're  
12 classifying?

13 A. Yes, as part of understanding the mechanical operation of  
14 the devices submitted, I will disassemble and reassemble the  
15 device.

16 Q. And do you also do firearms instruction in your current  
17 job?

18 A. Yes, I do. I have taught down at the Firearms Law  
19 Enforcement Training Center in Glencoe and I have taught at the  
20 National Firearms Examiner Academy up in Maryland.

21 Q. And have you ever worked with bump-stock devices in your  
22 current position?

23 A. Yes, I have.

24 Q. And have you fired them?

25 A. Yes, I have.

1 Q. And have you taken them apart?

2 A. Yes, I have.

3 Q. And reassembled them?

4 A. Yes.

5 Q. And I guess as an estimate, how many classifications  
6 roughly would you say you've done?

7 A. In the neighborhood of 400.

8 Q. And Mr. Smith, have you testified as an expert witness  
9 before?

10 A. Yes, I have.

11 Q. Do you remember what courts you testified in? And if not,  
12 I think we've got that part of your CV available.

13 A. Yes, Northern District of Georgia, District of Arizona and  
14 the Southern District of New York.

15 Q. And those were criminal cases that you testified in?

16 A. That is correct.

17 MR. GLOVER: Your Honor, the defendant moves to  
18 qualify Mr. David Smith as an expert in the field of firearm  
19 mechanics and operations.

20 THE COURT: Any objection?

21 MR. KRUCKENBERG: No objection.

22 THE COURT: His testimony will be received as such.

23 MR. GLOVER: Thank you, Your Honor. My colleague,  
24 Mr. Soskin, is going to go through the presentation that has  
25 been not admitted, but I've forgotten the other term, I

1 apologize, as Exhibit Two.

2 COURTROOM DEPUTY CLERK: Identified.

3 MR. GLOVER: Identified. Thank you.

4 THE COURT: That's okay. By the way, I do have an  
5 iPad up here, I have some of my materials that I scan onto my  
6 iPad. I learned this from Court of Appeals judges, it's a good  
7 thing. I don't have to be flipping over here, like I'm  
8 flipping burgers looking through here. That's the old style.  
9 So I'm not surfing the Internet up here, I'm paying very  
10 careful attention.

11 MR. SOSKIN: Good morning, Mr. Smith. Good morning,  
12 Your Honor.

13 THE COURT: Good morning.

14 DIRECT EXAMINATION

15 BY MR. SOSKIN:

16 Q. Mr. Smith, why are you here today?

17 A. I am here to give a technical explanation of how bump fire  
18 systems work and bump-stocks compared to also technical  
19 explanation of how semi-automatic firearms and automatic  
20 firearms work.

21 Q. I understand you prepared a presentation for today, is that  
22 correct?

23 A. Yes, that is correct.

24 Q. And Mr. Smith, what kind of materials does your  
25 presentation contain?



1 A. My presentation contains videos, animations and texts that  
2 explains what I will be talking about.

3 Q. And did you draw your presentation from the administrative  
4 record in this matter?

5 A. No, I did not.

6 Q. The videos and bump-stocks, are the videos that you  
7 mentioned in the presentation are those fair and accurate  
8 representations of the firearms they portray?

9 A. Yes, they are.

10 Q. And the diagrams and animations that you mentioned were in  
11 your presentation, those are fair and accurate representations  
12 of what they portray?

13 A. Yes, they are.

14 Q. You mentioned that there are patents in your presentation?

15 A. Yes, there are.

16 Q. Where did you obtain those patents from?

17 A. I obtained those patents from the U.S. Patent website.

18 Q. And you mentioned that there are descriptions of how  
19 firearms work in your presentation?

20 A. That is correct.

21 Q. Who wrote those descriptions?

22 A. I wrote those descriptions.

23 Q. Those descriptions are fair and accurate depictions of the  
24 firearms that they're describing?

25 A. Yes, they are.

1 MR. SOSKIN: Your Honor, Mr. Smith's account explains  
2 why this is a demonstrative exhibit and not an exhibit we seek  
3 to submit into evidence, it is not part of the administrative  
4 record. However, Mr. Smith has just testified that the  
5 materials in it are fair and accurate representations.

6 THE COURT: You may proceed. I'm sure if there's some  
7 objection, I'll hear it.

8 BY MR. SOSKIN:

9 Q. Mr. Smith, what did you do to understand bump-stocks in  
10 preparation for today?

11 A. To understand bump-stocks I originally went to the National  
12 Firearms Collection and found a bump-stock in the National  
13 Firearms Collection which I then disassembled, reassembled and  
14 installed on an AR15 type firearm. I did test firing, then I  
15 went through the administration record for ATF and pulled what  
16 correspondence I could find on bump fire type devices. I also  
17 went through the United States Patent website and found all the  
18 patents I could on bump fire type devices.

19 THE COURT: Just so the record will be clear and make  
20 sure I understand, the AR15 is loosely the civilian version of  
21 the military's M16, am I right?

22 THE WITNESS: Yes, sir, the AR15 is the semi-automatic  
23 version of the M16 or M4.

24 THE COURT: Which is switchable between semi-automatic  
25 and full automatic.

1 THE WITNESS: The M4 and M16, yes, the military  
2 versions are switchable from semi-automatic to full automatic.

3 THE COURT: I just wanted the record to be clear.

4 BY MR. SOSKIN:

5 Q. Mr. Smith, were you involved in the issuance of the rule  
6 describing how bump-stocks are machine guns?

7 A. No, sir, I was not.

8 Q. And are you here to give us a legal judgment about whether  
9 a bump-stock is a machine gun?

10 A. I am not.

11 Q. Mr. Smith, is the presentation also on the screen in front  
12 of you?

13 A. Yes, it is.

14 Q. Is this a presentation you prepared for today?

15 A. Yes, it is.

16 Q. Could you demonstrate -- sorry, what does this first slide  
17 depict?

18 A. This first slide is a short video of me test firing a bump  
19 fired type stock on an AR15 type rifle.

20 Q. What model bump fire stock is that?

21 A. This is actually a Slide Fire type bump fire stock.

22 Q. Could you demonstrate this for us?

23 A. If you can hit play.

24 *(Video playing.)*

25 Q. Mr. Smith, describe for us what a bump-stock is?

1 A. A bump-stock is an accessory attached to a firearm to  
2 increase its rate of fire, to make it easier for somebody to  
3 fire a weapon faster.

4 Q. And what parts of a semi-automatic firearm get attached to  
5 a bump-stock device?

6 A. You would attach the receiver and the upper assembly on an  
7 AR type firearm to a pistol grip and chassis system of a bump  
8 fire stock.

9 Q. Do you remove a portion of the original rifle before you do  
10 that?

11 A. On an AR15 type rifle you would have to remove the pistol  
12 grip and the stock assembly.

13 Q. Which are then replaced by the new bump-stock piece, is  
14 that right?

15 A. Yes, that is correct. They are then replaced by the bump  
16 fire system.

17 THE COURT: Would it take an armorer to do that or  
18 could the individual weapon owner make that conversion?

19 THE WITNESS: A weapon owner should be able to, it's  
20 fairly simple, sir.

21 THE COURT: Okay.

22 BY MR. SOSKIN:

23 Q. Mr. Smith, what are all these on this slide?

24 A. These are the front pages from several different patents  
25 that I found while I was doing my patent research and it

1 demonstrates that all these different devices work under the  
2 same mechanical principles.

3 Q. Where you wrote that the previous patent is just one of  
4 numerous patents for similar devices, what did you mean by  
5 similar?

6 A. I mean that they all operate under the same mechanical  
7 function and principles.

8 Q. When you did your research did you find more patents than  
9 just these?

10 A. I did. I found around 25 patents.

11 Q. Mr. Smith, what happens when you initiate firing on a  
12 semi-automatic firearm equipped with a bump-stock, can you  
13 describe that for us?

14 A. Yes. I have a small video that would assist.

15 *(Video playing.)*

16 The shooter will place the stock in their shoulder, as you  
17 can see the shooter's finger the through the trigger guard.  
18 I'll go into the patent a little later on a Slide Fire type  
19 device like this one. Shooter's finger is resting on a finger  
20 rest, so they're holding it in place. As you can see with the  
21 left hand, the shooter is pressing forward and as long as that  
22 shooter is pressing forward, the weapon will bring the trigger  
23 into contact with the shooter's finger and it will fire, recoil  
24 will cause the weapon to move back and slide inside the bump  
25 fire stock. And while the shooter is continuing to press

1 forward, it will overcome that recoil impulse allowing it to  
2 fire again.

3 Q. When does it stop?

4 A. It stops when the shooter stops pressing forward, removes  
5 their trigger finger or when it runs out of ammunition.

6 Q. What happens when you initiate fire on a semi-automatic  
7 firearm without a bump-stock?

8 A. Semi-automatic firearm without a bump-stock goes through  
9 the cycle of operations. Once the firing is initiated, whether  
10 that's a trigger pull, pressing of a button, switch, however  
11 you initiate the firing sequence, it has a self-regulating  
12 mechanism that allows it to extract the spent cartridge, eject  
13 it, load the new cartridge and either cock the hammer or charge  
14 the firing pin system and then it stops.

15 Q. How many shots does it fire before it stops?

16 A. It will fire one shot.

17 Q. Mr. Smith, you used the term "cycle of operations" to  
18 describe what a firearm is doing in your last answer. What  
19 does that mean?

20 A. I have an animation here, it was actually created by the  
21 FBI, to assist me. If you can put it on Colt LE semi, press  
22 the semi, and then take the X-ray controls on the left-hand  
23 side all the way up.

24 As you can see in this animation, the weapon is currently  
25 loaded, the cycle of operations is what happens when you pull

1 the trigger which is the red part, it releases the yellow  
2 hammer, strikes the firing pin, ignites the primer, bullet is  
3 expelled. This is a gas impingement type weapon, so the gases  
4 force the bolt and bolt carrier back, extracting, ejecting the  
5 cartridge, loading the next round, and in the process it cocks  
6 the hammer.

7 Now, in this semi-automatic you'll notice there is a yellow  
8 hammer, a blue disconnecter and a red trigger. When it cocks  
9 the hammer, the hammer is caught on the disconnecter. Almost  
10 all semi-automatic firearms have some sort of disconnecter in  
11 them to keep them from having hammer follow or from running  
12 automatically.

13 Q. You mentioned some of the colored parts in there. Could  
14 you describe for us again what the colored parts of the fire  
15 control group are here?

16 A. Yes. The red part is the trigger, the blue is the  
17 disconnecter and the yellow is the hammer.

18 MR. SOSKIN: Can we have the next slide please?

19 BY MR. SOSKIN:

20 Q. What rate of fire does a semi-automatic rifle have?

21 A. A semi-automatic rifle can typically fire as fast as the  
22 shooter can pull with their trigger finger. Jerry Miculek --  
23 and I probably pronounced the name wrong -- is known for having  
24 one of the fastest trigger fingers in the world. I have a  
25 short video here of him firing semi-automatic firearms to

1 demonstrate just how fast somebody can fire a semi-automatic  
2 weapon.

3 *(Video playing.)*

4 In this next little section, you'll have a good view from  
5 the side. And if you watch his trigger finger, his trigger  
6 finger is going back and forth for every single shot, but that  
7 is quite fast.

8 MR. SOSKIN: I would note for the record at this point  
9 that although Mr. Smith's exhibit is demonstrative, there is in  
10 the administrative record comments that were submitted by  
11 various commenters on the notice of proposed rule making  
12 directing the government's attention to Mr. Miculek, whose name  
13 I'm also butchering, and videos such as the one --

14 THE COURT: Quite frankly, maybe there's a reason for  
15 this, but it seems to me -- now, I happen to be familiar with  
16 semi-automatic, automatic weapons because of my military  
17 background in both the Marine Corps and the Army, but there may  
18 well be some judges and I say this with respect because, you  
19 know, there's a lot of professional -- some of the most highly  
20 qualified professional people in the world who aren't carefully  
21 familiar with firearms who may not be. I don't see why these  
22 undisputed videos for both the defense and the government  
23 shouldn't be admitted.

24 MR. SOSKIN: Your Honor, that goes to the government's  
25 position that this is a matter for review on an administrative



1 record and so that the appropriate actual matters in evidence  
2 should be either the contents of that administrative record,  
3 otherwise they are simply background information that the  
4 agency was familiar with.

5 THE COURT: Well, my concern is that I would love to  
6 have the Appellate Court be in a position to view these videos  
7 for -- I mean, is there any objection to the Appeals Court  
8 looking at these for familiarity purposes, if nothing else? I  
9 have no authority to admit something or tell the Appeals Court  
10 what to look at or what not to look at, that's for sure, but  
11 for instance, the difference between a semi-automatic and how  
12 the bump-stock fires semi-automatic verses automatic. These  
13 videos would be very instructive for someone who may be a  
14 hunter and use a hunting rifle, but I don't know many people  
15 who hunt with automatic weapons, at least not legally in the  
16 United States, so --

17 MR. SOSKIN: Your Honor, as a jurist who is familiar  
18 with firearms, we believe the Court could take judicial notice  
19 that a video such as the one linked here is illustrative of the  
20 background principles that Mr. Smith described, but we would  
21 hew to our position that the appropriate way of reviewing  
22 plaintiff's challenge in this case --

23 THE COURT: I don't deny that, I understand what your  
24 position is. I'm just saying that I would like to see these  
25 videos be made available for the Court of Appeals to look at.

1 And so I don't see any objection for background information of  
2 them looking at these videos should they choose to do so. This  
3 will be their decision. Does anybody have any objection to  
4 that?

5 MR. SOSKIN: No, Your Honor.

6 MR. KRUCKENBERG: No, Your Honor.

7 THE COURT: So we'll send those up to the Court of  
8 Appeals so they can look at them if they want without objection  
9 from the parties, understanding that these are not evidence,  
10 but they are in order to possibly familiarize them with the  
11 operation of a bump-stock, a semi-automatic weapon, automatic  
12 weapon, how they operate, okay.

13 MR. SOSKIN: Yes, Your Honor.

14 THE COURT: But I want to emphasize that I am not  
15 suggesting for a second that I don't need it but the Court of  
16 Appeals needs it or something of that kind. It just so happens  
17 that I happen to have a military background and I've operated  
18 these weapons in my capacity in the Marine Corps and in the  
19 Military Police Corps as a commissioned officer and there may  
20 be Court of Appeals judges have tons more experience with these  
21 weapons than I do, but there also may be a few Court of Appeals  
22 judges who have not had a lot of familiarity with these kinds  
23 of firearms even though they may be hunters and excellent  
24 hunters. As I said, you don't hunt with an automatic weapon,  
25 so, you know -- and my son-in-law, by the way, who is over in

1 Iraq and was a machine gun operator over there in Afghanistan  
2 as well knows a lot more about these weapons than I do, so I  
3 mean everybody has a different level with them, so I do not  
4 under any circumstances want to make that suggestion, but there  
5 just may be somebody who would say to themselves, yeah, I'd  
6 like to see what this looks like in operation.

7 MR. SOSKIN: Your Honor, we can attach to our closing  
8 argument submission an exhibit that lists the web addresses of  
9 the publicly available videos.

10 THE COURT: That would be a good way of doing it and  
11 we'll do that, I guess. You can do that with your videos as  
12 well. All right?

13 MR. KRUCKENBERG: Yes, Your Honor.

14 COURTROOM DEPUTY CLERK: Because they're not evidence,  
15 right?

16 THE COURT: They're not evidence. And I think the  
17 Court of Appeals -- look, these are very fine judges. They  
18 understand the difference between a demonstrative exhibit,  
19 which we show to the jury all the time, and an exhibit which is  
20 in evidence, they understand that difference, but sometimes  
21 it's good to be able to see it so you understand what you're  
22 reading and what you're hearing so you understand the arguments  
23 of both sides and this is not, to be honest with you, a totally  
24 uncomplex matter. I mean, I had a mistaken belief, I had a  
25 misunderstanding of how bump-stocks worked because I didn't

1 have a familiarity with them and I have more than the average  
2 person's understanding of -- I was an enlisted Marine and,  
3 believe me, I had a lot of different weapons, but I never had  
4 one with a bump-stock. I don't think they had bump-stocks back  
5 then. Believe me, they didn't. I was in the old days where  
6 the toughest thing we had to fire was one of these crack the  
7 barrel -- what are these things called?

8 THE WITNESS: M79, sir.

9 THE COURT: M79 grenade launcher. I fired expert with  
10 the M79 grenade launcher. I thought it was a magnificent  
11 weapon. I could put one through a window, but I'm going to  
12 tell you something, that was certainly no machine gun and it  
13 certainly didn't have a bump-stock. Looked like a shotgun  
14 shell, big shotgun shell. All right.

15 MR. SOSKIN: Your Honor, just to clarify a statement  
16 that I believe I heard the Court make a moment ago, I believe  
17 there is evidence in the record that at least some commenters  
18 asserted that they used bump-stock devices actually here in  
19 Texas to hunt Feral hogs. So there may on occasion be a  
20 situation where these would be used for hunting.

21 THE COURT: Okay, well, I assume that if anybody was  
22 running around using a bump-stock for hunting Feral hogs, they  
23 were taking the position they weren't machine guns because you  
24 can't take a Thompson machine gun out at full automatic or an  
25 M16 military rifle and go hunt hogs, even though we all

1 probably would like to see fewer hogs, Feral hogs running  
2 around. I don't think there's a state limit on hogs or even a  
3 season for hogs.

4 MR. SOSKIN: Can I have the next slide please?

5 THE COURT: I have a neighbor that would like to take  
6 a machine gun to hogs, darn things tear up his backyard all the  
7 time.

8 BY MR. SOSKIN:

9 Q. So if an automatic firearm isn't one that shoots at a  
10 higher rate, because some people like Mr. Miculek can move  
11 their finger really, really fast, what is an automatic firearm?

12 A. An automatic firearm is a weapon which when the firing  
13 cycle of operations is initiated, again that can be a  
14 mechanical trigger, a button, a switch, however that cycle of  
15 operations is initiated, has some self-regulating mechanism to  
16 assist with that cycle of operation. That may be a motor or it  
17 may actually use energy in the cartridge through flowback,  
18 recoil, short recoil, any one of those operations to extract a  
19 cartridge, eject a cartridge, load the next cartridge, cock the  
20 firing mechanism, whatever that may be, and actually fire  
21 another cartridge and continue that cycle of operation until  
22 something changes, either that initiation sequence is stopped  
23 or the weapon malfunctions or runs out of ammunition.

24 Q. What does that look like?

25 A. I have a short video of an M16 automatic rifle being fired.

1       *(Video playing.)*

2       The shooter is loading ammunition, just loaded a round to  
3 the chamber, you notice he pulls the trigger and holds it and  
4 it fires until it's out of ammunition. Again he's loading a  
5 magazine full of ammunition, round to chamber, pulling the  
6 trigger and as long as he holds it, it fires until it runs out  
7 of ammunition.

8               MR. SOSKIN: Go to the next slide please.

9 BY MR. SOSKIN:

10 Q. What is the mechanical difference between semi-automatic  
11 firearm you showed us earlier and the automatic firearm that we  
12 just saw?

13 A. If we can put back up the FBI animation, I will go through  
14 that process on a AR15/M16 type firearm. If you can change it  
15 to the Colt full auto and switch it to auto.

16       You'll notice there's a green part on here, that is the  
17 auto sear for an M16 type firearm. That is what allows you to  
18 fire an M16 full automatic. Again the cycle of operation, I'll  
19 let the video catch up here in a second. As you have a loaded  
20 round, you pull the trigger, the yellow hammer will fall, this  
21 is a gas impingement type, it will drive the bolt carrier and  
22 bolt back cocking the hammer. Notice the hammer catches on the  
23 auto sear, not on the disconnecter. As the bolt carrier comes  
24 forward and locks, it trips the auto sear allowing the hammer  
25 to fall, so that as long as the trigger is held to the rear,

1 the weapon will continue to fire as long as it has ammunition  
2 and does not malfunction.

3 Q. So the principle mechanical differences between the AR15  
4 and the M16, I believe the question the Court asked earlier,  
5 what are those different parts?

6 A. The mechanical difference is the auto sear, auto sear  
7 spring and safety.

8 Q. Only three significant parts that change from one to the  
9 other?

10 A. Yes.

11 MR. SOSKIN: Next slide please.

12 BY MR. SOSKIN:

13 Q. How does a bump-stock relate to an AR15 or semi-automatic  
14 firearm?

15 A. A bump-stock -- in this case a Slide Fire type bump-stock  
16 is installed on an AR15 type firearm. Part number 34, and this  
17 is from one of the Slide Fire patents, it is called a bearing  
18 surface, it is used to replace the traditional pistol grip.  
19 Part number 72 is the bearing slideway which is part of the  
20 chassis. You see there it's the pistol grip and the part that  
21 goes over the buffer tube. Part 60 is the shoulder stock that  
22 goes on the chassis. And part number 82 is that U piece you  
23 see behind the chassis and that actually contains the finger  
24 rest.

25 Q. When the receiver and upper assembly are installed on the

1 bump-stock, what part here do they rest on?

2 A. They rest on the bearing surface and the upper assembly and  
3 the buffer tube will actually go inside the chassis, the rear  
4 of the chassis there.

5 Q. When a Slide Fire slides, what is it that is sliding?

6 A. It's actually the bearing surface on the bearing slide,  
7 that part that goes onto the pistol grip actually slides inside  
8 on the bearing surface part of that chassis.

9 Q. Next slide. So you have a bump-stock, how do you as the  
10 shooter make use of it?

11 A. With a bump-stock installed on an AR type firearm, you  
12 would load the weapon, place the weapon on fire and as you put  
13 the weapon up to your shoulder, you would need to press the  
14 firearm all the way back into the bump-stock. Once you have it  
15 securely against your shoulder with the weapon all the way back  
16 inside the bump-stock, you can then take your trigger finger,  
17 put it into the trigger guard all the way across and you're  
18 going to rest your finger on that trigger rest. At this point  
19 your trigger finger is operating basically as a post, it could  
20 be replaced by a post and would function the same way.

21 With your off hand you're going to take a secondary grip,  
22 whether that's the fore end, vertical grip, whatever it may be  
23 and you're going to press the firearm forward.

24 While holding the shoulder stock end of your shoulder with  
25 your right hand and your finger on the trigger rest -- sorry,



1 finger rest.

2 As you push the firearm forward with that secondary grip,  
3 the mechanical trigger of the AR will actually come in contact  
4 with your finger and the trigger will be pulled to the rear and  
5 initiate the first fire. Recoil impulse from actually firing  
6 the cartridge, basic physics, you're sending a projectile in  
7 one direction, you have an equal and opposite force will  
8 actually move the receiver and upper assembly back along the  
9 slideway inside the slide stock. And while the shooter is  
10 continuing to press forward, the shooter will eventually  
11 overcome that recoil impulse pressing it back forward. While  
12 the receiver in upper assembly have slid back inside the slide  
13 stock, it has performed its cycle of operations and the trigger  
14 has reset because it has come out of contact with the shooter's  
15 trigger finger. At which point, as I said, when the shooter  
16 can overcome that recoil impulse while continuing to press  
17 forward will bring that trigger back in contact and fire the  
18 next round.

19 Q. Next slide please. Does this show us what you just  
20 described?

21 A. Yes, this is a New York Times animation that shows this.  
22 You can see the trigger finger is already across and on a  
23 finger rest. The shooter is pressing forward on that secondary  
24 grip and you can see recoil impulse brings the receiver and  
25 upper assembly back inside the Slide Fire bump fire stock

1 device bringing that mechanical trigger away from the shooter's  
2 finger and then by continuing to press forward, it brings it  
3 back in contact firing the next round.

4 MR. SOSKIN: Your Honor, I note that this animation  
5 appears in the administrative record as AR page 716.

6 THE COURT: Thank you.

7 BY MR. SOSKIN:

8 Q. Could you also describe the mechanical operation that is  
9 going on and is reflected in this animation?

10 A. The mechanical operation of the actual firearm itself, the  
11 initiation sequence is actually pressing forward on that  
12 secondary grip, that brings the trigger into contact with the  
13 finger, mechanically that releases the hammer which hits the  
14 firing pin, firing pin ignites the primer expelling a  
15 projectile by the action of explosive from the powder inside  
16 the cartridge. AR type firearms are gas impingement, gas is  
17 reported off into the gas key and inside the bolt carrier which  
18 is then driven back unlocking the bolt and extracting,  
19 ejecting, chambering the next cartridge and cocking the hammer.

20 During this time, recoil has moved the firearm back inside  
21 the slide bump fire stock moving the mechanical trigger away  
22 from the shooter's finger so that it can reset. Continuing  
23 pressure from the secondary grip pressing forward overcomes  
24 that recoil impulse bringing the trigger back in contact with  
25 the shooter's finger, releasing the hammer and starting the

1 cycle of operations over again.

2 Q. When does it stop shooting?

3 A. When the shooter stops pressing forward, removes their  
4 finger or it runs out of ammunition.

5 MR. SOSKIN: Can we advance to slide 17 please?

6 BY MR. SOSKIN:

7 Q. Mr. Smith, earlier the Court asked whether it took an  
8 experienced armorer to assemble a bump-stock and semi-automatic  
9 firearm. Could you tell us what this slide shows?

10 A. This shows an AR15 type receiver and upper assembly and it  
11 shows a slide fired type bump fire device.

12 As you can see, you have the small square which is what  
13 replaces the traditional pistol grip. And then the chassis  
14 system goes onto that square and over the receiver extension or  
15 buffer tube when you install it. All it really takes is being  
16 careful not to lose the safety detent and safety detent spring  
17 and the ability to either use a screw or an Allen wrench to  
18 install that small block in place of an AR15 pistol grip.

19 Q. This slide depicts a Slide Fire device that ATF owns?

20 A. It does. This is the Slide Fire device I examined out of  
21 the National Firearms Collection.

22 Q. How long did it take you to put together this Slide Fire  
23 with an AR15 receiver?

24 A. It took me less than two minutes.

25 Q. How long would it take an ordinary AR15 owner?

1 A. I would expect that they could do it in five minutes or  
2 less.

3 Q. Next slide. Once you put it together, this is the result?

4 A. Yes, this is me actually firing the Slide Fire stock on an  
5 AR15 out of the Natural Firearms Collection.

6 Q. Show the video one more time.

7 *(Video playing.)*

8 A. As you can see, I have it back in my shoulder, I have my  
9 finger on the trigger rest, I press forward, and it fires until  
10 I run out of ammunition. That was 25 rounds.

11 MR. SOSKIN: Thank you, Mr. Smith. Nothing further.

12 THE COURT: Cross-examination.

13 MR. SOSKIN: Your Honor, if I could clarify one thing.

14 THE COURT: Yes.

15 MR. SOSKIN: The exhibit that we will submit with the  
16 web links, that is in addition to our 20 pages of briefing?

17 THE COURT: That's in addition to it.

18 MR. SOSKIN: Thank you.

19 CROSS-EXAMINATION

20 BY MR. KRUCKENBERG:

21 Q. Good morning, Mr. Smith.

22 A. Good morning, sir.

23 Q. You testified on direct examination a little bit about your  
24 background in your CV, right?

25 A. Yes, sir.

1 Q. One thing that you and I discussed when we met was that  
2 you're also a target shooter, isn't that right?

3 A. That is correct.

4 Q. And you actually compete in contests, right?

5 A. Yes, I do.

6 Q. You would consider yourself an expert marksman, is that  
7 fair?

8 A. I don't know if anyone ever really becomes an expert.  
9 They're always trying to be better, but yes, I am a good  
10 marksman.

11 Q. Okay. And I'm going to take your answer here as evidence  
12 that you are an expert because you're being humble there about  
13 your shooting ability.

14 A. Thank you, sir.

15 Q. Now, Mr. Smith --

16 THE COURT: Let me ask you this question, Mr. Smith.  
17 When you were in the Marine Corps, did you ever fire expert?

18 THE WITNESS: Yes, sir.

19 THE COURT: There's your answer.

20 BY MR. KRUCKENBERG:

21 Q. I know you testified about this on direct, you're very  
22 familiar with all different types of firearms, correct?

23 A. Yes, sir.

24 Q. And you said you had done ATF classifications approximately  
25 400 times in your career, is that fair?

1 A. Yes, sir.

2 Q. And most of those classifications dealt with imported  
3 firearms, right?

4 A. Yes, the majority of ATF classifications are either on  
5 criminal side for criminal prosecution or on the import side  
6 for approving for importation.

7 Q. And the process is basically the same for importation,  
8 right, you get a firearm and then you're asked to test fire it  
9 to see how it's classified under the laws, correct?

10 A. Yes.

11 Q. Now, you also test prototypes, right?

12 A. That is correct. Industry also submits prototypes for us  
13 to examine and figure out where they fit under the law of rules  
14 and regulations.

15 Q. And when the ATF previously classified the Slide Fire  
16 device, it was submitted as a prototype, right?

17 A. I believe that is correct.

18 Q. Okay. And there is a standard operating procedure that the  
19 ATF follows when it receives a prototype requesting a  
20 classification, right?

21 A. Yes.

22 Q. And one of the requirements for ATF to be able to issue a  
23 classification is that they actually have to receive the device  
24 itself, right?

25 A. That is correct.

1 Q. ATF cannot issue a classification based on just a drawing  
2 or a description of the device, is that right?

3 A. Correct. Firearms enforcement officers must receive a  
4 physical sample to actually give a formal classification.

5 Q. And that process requires the examining officer, the  
6 examining member of the ATF to take the prototype and test fire  
7 it, right?

8 A. That is part of the process, yes.

9 Q. And when you say that you have done that, you've done that  
10 say more than a hundred times, right?

11 A. Yes, for different devices.

12 Q. I'm going to show you what has been previously admitted as  
13 Plaintiff's Exhibit Four. And Mr. Smith, can you see that  
14 document in front of you?

15 A. Well, I can see the header, yes.

16 Q. And I will just describe this briefly for you. This is a  
17 classification letter addressed to Mr. Rhodes from the ATF, is  
18 that correct?

19 A. That's what it appears to be.

20 Q. Have you seen this document before?

21 A. Yes, sir. I don't remember all the details of it, but yes,  
22 I have seen this document.

23 Q. And this document is stamped at the top April 5th, 2007, is  
24 that right?

25 A. Yes, it says it was sent on April 5th of 2007.

1 Q. And just going down to the bottom of the page of this  
2 document, you might see an asterisk next to a paragraph that  
3 starts "We caution", do you see that?

4 A. Yes, sir.

5 Q. And this classification letter memorializes what you were  
6 talking about, it says that "We caution that FTB cannot make  
7 classification of pictures, diagrams or theory", right?

8 A. Yes, sir.

9 Q. And that is consistent with your understanding of ATF's  
10 process?

11 A. That is correct.

12 Q. Now, you testified on direct examination you've fired a  
13 Slide Fire bump-stock, correct?

14 A. That is correct, sir.

15 Q. Have you fired any other types of bump-stocks?

16 A. I have fired an Akins type device.

17 Q. So let's talk about the Akins device. That device has a  
18 spring inside, doesn't it?

19 A. The one I fired actually had two springs.

20 Q. So an Akins type device, that is a form of a bump-stock,  
21 isn't that right?

22 A. Yes, it uses that bump fire principle as part of its  
23 mechanical operation.

24 Q. But the primary distinction between an Akins device and a  
25 Slide Fire device is that it has those two springs you just



1 mentioned, isn't that right?

2 A. Yes, it has two springs that press the fire control  
3 mechanism and receiver back forward inside the stock.

4 Q. And so when you're using an Akins device on a -- and you  
5 mount it the same way, don't you, you mount it on a  
6 semi-automatic firearm like an AR15?

7 A. Yes, the one that I examined was actually mounted on a  
8 Ruger 1022.

9 Q. And so the device, Akins device is mounted on the  
10 semi-automatic and it's a shoulder stock just like the Slide  
11 Fire, right?

12 A. Yes, sir.

13 Q. And when the shooter fires it, the recoil of the firearm  
14 drives it back towards the shooter's arm, right?

15 A. Yes. When the shooter pulls the trigger, the way the Akins  
16 type device works is the stock is pressed into the shoulder,  
17 pull on the trigger, that will actually initiate the firing  
18 sequence. The receiver and fire control mechanism will under  
19 recoil slide back into the stock and the two springs will  
20 actually drive the trigger mechanism and receiver back forward  
21 into the shooter's trigger finger. So you actually only need  
22 one hand to fire and it will continue to fire until you remove  
23 your trigger finger from the trigger guard or it runs out of  
24 ammunition.

25 Q. So instead of having to push forward with the non-shooting

1 hand, the springs drive the device -- the weapon forward, isn't  
2 that right?

3 A. That is correct.

4 Q. The Slide Fire obviously does not have a spring, right?

5 A. That is correct.

6 Q. And so that's what you mentioned about the pushing forward  
7 with the non-shooting hand, right?

8 A. Correct.

9 Q. That is the primary distinction between those two devices?

10 A. Yes.

11 Q. Okay. You testified earlier about the operation of a  
12 machine gun, right?

13 A. Yes.

14 Q. And what we normally think of as a machine gun are things  
15 like what Judge Ezra mentioned, Browning automatic rifle,  
16 Thompson submachine gun, right?

17 A. Those are types of machine guns, yes, sir.

18 Q. Now, you understand that a weapon's trigger can be  
19 initiated in more than one way, right, not just pulling the  
20 trigger, is that fair?

21 A. Yes, there are multiple ways of initiating that cycle of  
22 operations. Like an aircraft, it's a trigger on a joystick,  
23 for some long-range precision firearms you enter a key on a  
24 keyboard, for artillery pieces it's similar, there's an enter  
25 key or lanyard, it may not necessarily be a physical trigger

1 that you're pulling.

2 Q. And when you say -- when you understand the term "single  
3 function of a trigger", that's what you're referencing, the way  
4 the trigger mechanism is initiated, is that fair?

5 A. Yes.

6 Q. Now, a machine gun is a device that will require once  
7 there's an initial input it will fire until it's out of  
8 ammunition without an additional input, isn't that right?

9 A. It may require continued input. As I showed in the M16  
10 video, the shooter has to continue to pull the trigger. Of  
11 course, if they release the trigger, that would be another  
12 input to stop the cycle of operation.

13 Q. There are some machine guns, though, that don't require any  
14 additional input, right?

15 A. That is correct.

16 Q. Like you mentioned, there are some that are button  
17 operated, you hit the button and they just fire?

18 A. Correct. You hit the button, it will fire until you either  
19 run it out of ammunition, it malfunctions or you do another  
20 input, another press of a button to stop it from firing.

21 Q. And the semi-automatic firearm is one that needs additional  
22 input between rounds, isn't that right?

23 A. Correct. As I mentioned and as I showed with the AR15,  
24 most semi-automatic firearms have some sort of disconnect so  
25 that they will not continue to fire until the shooter does some

1 sort of secondary input.

2 Q. And so when you were looking earlier at the AR15 when it  
3 was semi-automatic firearm, if the shooter pulls back on the  
4 trigger lever --

5 A. Yes.

6 Q. -- it will fire once, right?

7 A. Correct, because the hammer will catch on the disconnecter.

8 Q. And if the shooter continues to hold the trigger, doesn't  
9 release it, it will not fire again, right?

10 A. Correct, it should not.

11 Q. And that it does so mechanically and that's the animation  
12 you showed us, right?

13 A. That is correct.

14 Q. Now, I noticed on your CV the course where you received  
15 training on historic firearms. Do you recall that course?

16 A. Yes.

17 Q. And one of the firearms you received training on is  
18 actually the Gatling gun, right?

19 A. Correct.

20 Q. Gatling gun is a weapon, and correct me if I'm wrong here,  
21 where the shooter turns a crank basically and it fires  
22 repeatedly, is that accurate?

23 A. It depends on the type of Gatling gun. For some types that  
24 is correct.

25 Q. Okay. And a Gatling gun is not a machine gun, isn't that

1 right?

2 A. I don't believe I'm here to testify as far as actual  
3 classifications.

4 Q. Well, are you aware of what the ATF has classified a  
5 Gatling gun?

6 A. Some Gatling guns are not classified as machine guns, they  
7 are classified as firearms.

8 Q. And the reason they're not classified as machine guns is  
9 because -- and I'm talking about the mechanical crank here, you  
10 have to turn the crank and every time you turn the crank it  
11 advances another round, isn't that right?

12 A. Yes.

13 THE COURT: Gatling gun covers a huge range of  
14 weapons.

15 MR. KRUCKENBERG: Yes.

16 THE COURT: Are you talking about the kind of Gatling  
17 gun they had in the 1860s and '70s where it was on a big wheel  
18 cart and you would turn the crank or are you talking about a  
19 modern Gatling gun you can find in the Army arsenal, the  
20 Marines, the Air Force has them on jets? They can fire  
21 thousands of rounds a minute. There's even something called a  
22 mini gun.

23 MR. KRUCKENBERG: Yes, Your Honor. And I think I'm  
24 making that distinction.

25 Q. Mr. Smith, so we're clear, when I reference the Gatling gun

1 that's what I'm talking about, the old trigger crank with the  
2 entire barrel -- that has multiple barrels and they turn.

3 THE COURT: Because the old Gatling gun didn't fire  
4 actually very fast.

5 MR. KRUCKENBERG: Yes, Your Honor.

6 THE COURT: It just didn't. I'm not offering evidence  
7 here, but I think I can take judicial notice, I don't think  
8 anybody would object. I mean when you were cranking, that  
9 thing was dut-dut-dut-dut-dut-dut-dut. You could fire faster  
10 with a Spencer repeating rifle.

11 MR. KRUCKENBERG: I think we saw, Your Honor, you can  
12 fire faster with a pistol if you're Mr. Jerry Miculek.

13 THE COURT: I think the witness would agree with me  
14 that an old style 1850 or 1860s Gatling gun --

15 THE WITNESS: Yes, the way those operate is as you  
16 turn the crank, it actually rotates the barrel and in rotating  
17 the barrel the bolt actually runs on a slide within the  
18 receiver. So what actually happens is as you rotate the  
19 barrel, the bolt comes back, extracts ejects the current  
20 cartridge. As it continues to rotate, it will strip the next  
21 cartridge out of the magazine and as it goes all the way  
22 forward it has a trip already set in the receiver so that as it  
23 locks it will fire that next round.

24 Again as you rotate, turn the crank, it will remove that  
25 bolt, pull it back, extract, ejects and as it goes forward it

1 will strip the next cartridge and when it gets forward and is  
2 locked into place it will trip the firing mechanism and fire  
3 the next round.

4 BY MR. KRUCKENBERG:

5 Q. You mentioned something on your direct examination called  
6 on auto sear, isn't that right?

7 A. Yes, sir. M16 has an auto sear in it.

8 Q. That is a mechanical part of a machine gun, some machine  
9 guns, that allows the weapon to continuously fire, isn't that  
10 right?

11 A. Correct. It is the mechanical piece that allows it to  
12 continue to fire automatically without further input from the  
13 shooter.

14 Q. And what it allows is when the shooter pulls back on the  
15 trigger mechanism, engages the trigger, it allows the firing  
16 pin to continuously strike another round, isn't that right?

17 A. Mechanically what it does is it allows the hammer to  
18 interact with the auto sear instead of interacting with the  
19 disconnecter. The disconnecter would keep it from shooting a  
20 second round without the actual red part, the mechanical  
21 trigger being released and then pulled again. What it does, it  
22 allows that hammer to be caught on an auto sear and as the bolt  
23 comes home and locks, the rear of the bolt carrier trips it so  
24 that the hammer falls, hits the firing pin, ignites the primer  
25 and repeat the cycle of operation.

1 Q. You agree that the rate of fire of a weapon does not  
2 determine whether or not it is a machine gun, isn't that right?

3 A. That is correct.

4 Q. And that's why we watched the video earlier of the shooter  
5 who can fire a semi-automatic very quickly, right?

6 A. That is correct.

7 Q. Now, just talking about the Slide Fire itself, it's a  
8 basically a piece of plastic, isn't that right?

9 A. It's several pieces of plastic and rubber yes, sir.

10 Q. And as you mentioned, there are no internal springs in the  
11 Slide Fire, right?

12 A. Not in the one I examined and not described in any of the  
13 patents I examined.

14 Q. And it has no other mechanical components to it, does it?

15 A. It has the slideway that attaches where the pistol grip  
16 would go and then the chassis system to which everything else  
17 attaches.

18 Q. And you'll agree with me that when you install a Slide Fire  
19 on a semi-automatic firearm, you don't change any of the  
20 trigger mechanisms, the auto sear or the hammer or anything  
21 like that, is that correct?

22 A. Correct.

23 Q. And so it doesn't remove a semi-automatic firearm's  
24 disconnecter, right?

25 A. Correct, it does not.



1 Q. And it doesn't add an auto sear, right?

2 A. No, it does not.

3 Q. And so -- I'll move on.

4 Now, you agree with me also that the ATF previously  
5 examined the Slide Fire device and issued a classification,  
6 right?

7 A. Yes, it did.

8 Q. And the original classification was that a Slide Fire was  
9 not a machine gun, right?

10 A. The original classification I believe was that it was an  
11 accessory.

12 Q. Now, the ATF's current understanding is that the Slide Fire  
13 device itself is a machine gun, isn't that right?

14 A. I'm not here again to give technical classifications.  
15 Under the current rules and regulations as I understand them,  
16 yes, it would be.

17 Q. And that's independent of whether it's attached to another  
18 firearm, isn't that right?

19 A. Correct. Under my current understanding of the rules and  
20 regulations, it's an accessory designed and intended to convert  
21 a semi-automatic weapon to fire automatically.

22 Q. Mr. Smith, I'm going to show you a video that's been  
23 admitted as Plaintiff's Exhibit Two. And before we get into  
24 it, Mr. Smith, have you seen this video before?

25 A. From that screen, I don't know if I have or not.

1 Q. Can you see the video in front of you?

2 A. Yes, I can.

3 *(Video playing.)*

4 Q. So Mr. Smith, I'm going to stop the video here for about 12  
5 seconds in and we're looking at an AR15 type rifle, isn't that  
6 right?

7 A. It would appear so.

8 Q. And looking at this video, it also appears that there is a  
9 Slide Fire bump-stock attached to that rifle, isn't that right?

10 A. Yes, sir.

11 Q. And if you look at the stock itself, if you look at the  
12 shooter's cheek here, if you look down, you can see what's  
13 called the selector knob, isn't that right?

14 A. Yes, sir.

15 Q. One of the features of the Slide Fire is that it has a knob  
16 on the stock that allows the shooter to either lock it in place  
17 or unlock it, isn't that right?

18 A. On some of the later versions, yes, sir.

19 Q. And when you lock it in place, the stock operates just like  
20 a normal semi-automatic firearm, isn't that right?

21 A. Yes, as long as you do not engage the finger rest.

22 Q. And when you unlock it, the Slide Fire slides back and  
23 forth, right?

24 A. The receiver and upper assembly slide back and forth inside  
25 the Slide Fire chassis system, yes.

1 Q. And that is essentially how a bump-stock works is it allows  
2 this sliding back and forth while they're shooting, isn't that  
3 right?

4 A. Yes.

5 Q. Hence the name Slide Fire, right?

6 A. I believe so, I don't have any evidence as to exactly how  
7 they came up with the name.

8 Q. Fair enough. So if we look at this video, this is a  
9 high-speed video showing the stock in the locked position. And  
10 you'll agree with me looking at this video this is a normal  
11 semi-automatic fire, isn't that right?

12 *(Video playing.)*

13 A. Yes, sir, you can see that he has to move his trigger  
14 finger forward to allow the trigger to reset before he fires  
15 again.

16 Q. So we're at about 36 seconds into this video and there's a  
17 close-up here on what's happening with the trigger finger, do  
18 you see that?

19 A. Yes, sir.

20 Q. So you'll agree with me that the shooter here is he's  
21 pulling the trigger and when he pulls the trigger it -- the gun  
22 fires a round, right?

23 A. Yes, sir.

24 Q. And just as that's happening, you can actually see the  
25 magazine is transparent, you can see another round coming up,

1 isn't that right?

2 A. Yes. You can see the bolt go to the rear, you can see it  
3 extract, eject, you can see it chambering the next round.

4 Q. And if you look at his trigger finger, we can see he's  
5 pulling back on the trigger and then we see at some point his  
6 finger coming forward and the trigger mechanism reset. And if  
7 you look at I think it was 104, again this is a high-speed  
8 camera, you actually see his finger bounce, can't we? I'll  
9 play it again.

10 *(Video playing.)*

11 Did you see his finger bounce when it came back?

12 A. Yes, as he released it, you can see that his trigger finger  
13 moved.

14 Q. And that would be what happens when the trigger mechanism  
15 is resetting, isn't that right?

16 A. Yes, the trigger actually has to pivot on the trigger pin  
17 and actually move forward to reset onto the sear surface with  
18 the hammer.

19 Q. And for the firearm to reset like that, his finger has to  
20 come out of contact or he has to release the trigger, doesn't  
21 he?

22 A. He has to allow the trigger to move forward a certain  
23 amount.

24 Q. Because if he just holds it back, it won't reset?

25 A. Correct, if he continues to hold it back, the hammer will

1 stay on the disconnecter until he allows the trigger to rotate  
2 forward a certain amount.

3 Q. I'm going to fast forward this video a little bit.

4 *(Video playing.)*

5 I'm going to stop the video here, we're at about three  
6 minutes and 19 seconds into the video. This shows, according  
7 to the video, bump fire intended use, do you see that?

8 A. Yes, sir, I see it on the left-hand corner.

9 Q. And we just watched a very brief clip that appeared to be  
10 bump fire, isn't that right?

11 A. I honestly didn't catch enough of it.

12 Q. Let me go back slightly so that you can see it. Looking at  
13 the video, we're about 2:20 now and it's again high-speed  
14 image, you'll agree with me that that is bumped firing that  
15 we're seeing?

16 A. Yes, sir.

17 Q. And this is what happens when the shooter now has unlocked  
18 the stock and allows it to operate as a bump-stock, right?

19 A. Yes, sir.

20 Q. And if we're looking at the mechanism here, this is  
21 somewhat similar to the video you showed of yourself firing a  
22 Slide Fire, right?

23 A. Yes, sir.

24 Q. So we look at his non-shooting hand, in this case his left  
25 hand, it's on the barrel, right?

1 A. It's on the fore grip, yes.

2 Q. On the fore grip. And you'll agree with me he's pushing  
3 forward with his hand on the fore grip, right?

4 A. Yes, sir.

5 Q. And as we watch the video, here is a close-up at 3:35, we  
6 can see the trigger mechanism, right?

7 A. Yes, sir. You can see the trigger.

8 Q. So let me play the video briefly.

9 *(Video playing.)*

10 So at 3:47 we have another angle and I'm going to stop it  
11 here. Here in this video, we can see the trigger ledge, right?

12 A. Yes, the finger rest.

13 Q. The finger rest. And we see the shooter's trigger finger  
14 is resting on that rest, right?

15 A. Yes, sir.

16 Q. That's one of the parts of the Slide Fire?

17 A. That is correct.

18 Q. When the weapon fires and the recoil drives the weapon back  
19 and slides back into the shooter's shoulder, his trigger finger  
20 loses contact with the trigger lever, doesn't it?

21 A. Yes, it does.

22 Q. And that creates some amount of space between the trigger  
23 lever and the shooter's trigger finger, right?

24 A. Correct.

25 Q. And that is what allows the trigger mechanism to reset,

1 right?

2 A. Yes. As I said, the firing sequence is initiated by  
3 pressing forward on the secondary grip with the shooter's  
4 trigger finger as you can see on the trigger rest, that brings  
5 the mechanical trigger in contact with the shooter's finger.  
6 The recoil impulse, basically the physics of firing a round  
7 will drive the receiver and upper assembly back inside the  
8 Slide Fire or bump fire type device far enough to allow the  
9 mechanical trigger to reset and eventually the shooter will be  
10 able to overcome that recoil impulse by continuing to press  
11 forward bringing it back into -- that mechanical trigger back  
12 in contact with the trigger finger firing the next round.

13 Q. I'm going to back up slightly. I'm going to show you just  
14 a brief portion of this video starting at three minutes 45  
15 seconds. And I'll ask you to just look at the trigger finger  
16 here.

17 *(Video playing.)*

18 It was pretty quick there, but it was about three minutes  
19 47 seconds. Looking at the trigger mechanism, the lever coming  
20 down from the trigger, you actually see that bounce as it  
21 resets, don't we?

22 A. You see it move forward.

23 Q. Move forward.

24 A. Yes, it rotates forward on that pivot pin.

25 Q. And it locks into place, right?

1 A. Yes. What you're actually seeing is when it's pulled to  
2 the rear, of course that releases the hammer off the front sear  
3 surface, hammer catches on the disconnecter. As the trigger,  
4 the body itself moves forward, that moves the disconnecter out  
5 of contact with the hammer and the hammer resets on that front  
6 sear surface of the trigger.

7 Q. You'll agree with me that you cannot shoot a Slide Fire --  
8 a weapon equipped with a Slide Fire bump stock with one hand,  
9 isn't that right?

10 A. Without the more modern Slide Fire type devices locked in  
11 place, it would move back in the stock and the way the trigger  
12 area is formed, you can't reach far enough to pull the trigger.

13 Q. And I guess what I mean is when we're talking about bump  
14 firing, what you showed in your video, right, you could only do  
15 that using both hands, right?

16 A. Yes.

17 Q. And I think you testified when you're bump firing, if you  
18 stopped doing one of three things it stopped shooting. You  
19 said if you stopped pressing forward, you stopped pulling  
20 rearward or the weapon runs out of ammunition, right?

21 A. I said you can call it pulling rearward, but you're just  
22 typical holding the stock in your shoulder, you really don't  
23 have to pull to the rear. Pressing forward which is your  
24 initiator, if you stop pressing forward, if you remove your  
25 trigger finger or if it runs out of ammunition.



1 Q. And if you stopped any of those things, it stops firing,  
2 right?

3 A. Correct.

4 Q. You said you don't have to pull rearward, right, but you do  
5 have to hold your finger on the trigger ledge, right?

6 A. Yes, you do.

7 Q. You also have to hold the weapon, don't you?

8 A. Yes.

9 Q. So you would have to hold it against your shoulder?

10 A. A little bit, yes.

11 Q. Otherwise it would sort of go all over the place, right?

12 A. It would, but the Slide Fire type device as long as you  
13 hold your finger on the trigger ledge and are pressing forward,  
14 you would still bump fire the weapon.

15 THE COURT: Let me ask you a question. Let's say that  
16 you're comparing an AR15 with a bump-stock --

17 THE WITNESS: Yes, sir.

18 THE COURT: -- properly installed to what we've  
19 described as the equivalent which is an M16 switched on to full  
20 automatic.

21 THE WITNESS: Yes, sir.

22 THE COURT: Are there any operational -- I mean I  
23 understand the mechanics are different as to how, but let's say  
24 if you're firing an M16 on full automatic, in order to continue  
25 to fire full automatic you have to continue to keep your finger

1 down on the trigger, is that right?

2 THE WITNESS: Yes, sir.

3 THE COURT: If you take your finger off, you're going  
4 to stop firing.

5 THE WITNESS: Yes. On M16 as long as you pull the  
6 trigger to the rear and the selector is in the automatic  
7 position and you have ammunition, it will continue to fire.

8 THE COURT: Right. So the difference between the  
9 bump-stock is that you wouldn't have your hand on the trigger,  
10 you'd have your hand on what we call the finger rest or the  
11 trigger ledge or something?

12 THE WITNESS: Yes, sir. As I said --

13 THE COURT: And you would just have to keep your --  
14 instead of keeping the trigger pulled, you would pull back  
15 the -- what do you call it?

16 THE WITNESS: The secondary grip, sir.

17 THE COURT: The secondary grip.

18 THE WITNESS: Whether that be fore end secondary grip.

19 THE COURT: And then it would fire continuously until  
20 you let that go.

21 THE WITNESS: You're actually pushing forward.

22 THE COURT: Pushing forward, and that would continue  
23 to fire continuously until you either released it or let it  
24 fall back.

25 THE WITNESS: Yes, sir. Mechanically, as I said, you

1 could replace your trigger finger on a Slide Fire bump fire  
2 type device with a post and it would operate the same. What  
3 starts the firing sequence is that pressing forward.

4 THE COURT: So basically the pressing forward on the  
5 bump-stock AR15 is the equivalent of pulling the trigger on the  
6 military version of that rifle, the M16 in full automatic.

7 THE WITNESS: That is correct, sir.

8 THE COURT: Okay. You can continue. Just wanted to  
9 make sure I clarified that in my own mind.

10 MR. KRUCKENBERG: Yes, Your Honor.

11 BY MR. KRUCKENBERG:

12 Q. And when you're talking about pushing forward with a  
13 bump-stock, M16 with a bump-stock, when the shooter is  
14 continuously pushing forward, the trigger mechanism still  
15 resets between each round, doesn't it?

16 A. The physical trigger mechanism, yes, it is actually going  
17 through the full cycle operation of pressing against the  
18 trigger finger, at which point it is pivoted back, releasing  
19 the hammer, connecting with the disconnecter as, you know, the  
20 receiver and everything is sliding back. As the physical  
21 trigger comes out of contact with the trigger finger, that  
22 allows it to pivot forward, the hammer resets on the sear  
23 surface.

24 Q. And with the hand that's pushing forward, you'll agree with  
25 me looking at the video of you firing, your hand isn't

1 stationary, is it?

2 A. No. As I mentioned, it's physics, when you fire a round  
3 the weapon recoils. The weapon recoils faster than you can  
4 react. That is part of how the bump fire system works is that  
5 you are attempting to continually press forward, but the recoil  
6 impulse overcomes your ability to press forward, moves the  
7 firearm back inside the stock and mentally you're doing nothing  
8 but pressing forward and so it brings it back in contact with  
9 your trigger finger and fires again.

10 Q. So the action when we're looking at it because of the  
11 recoil, the firearm goes back against the shoulder and then we  
12 see the forward hand, the non-shooting hand pushing it forward?

13 A. Yes.

14 Q. And that continuous pushing forward, that's the mechanism  
15 that allows it to be fired again?

16 A. Yes.

17 Q. Because you're pushing the trigger into your stationary  
18 finger?

19 A. Yes, in effect you have moved the initiation of the firing  
20 sequence from the mechanical trigger to that pushing forward  
21 motion.

22 Q. You will agree with me that a bump-stock Slide Fire doesn't  
23 change the distance forward that the trigger lever has to move  
24 to be reset, right?

25 A. No, it does not.

1 Q. You'll also agree with me that firing a bump-stock, it's  
2 difficult, right?

3 A. For --

4 MR. SOSKIN: Objection.

5 THE COURT: I'm going to sustain that objection.  
6 That's too vague.

7 BY MR. KRUCKENBERG:

8 Q. Let's put it this way. You're an expert marksman, right?  
9 And you've fired a bump-stock?

10 A. Yes, sir.

11 Q. And the first time you ever fired a bump-stock, did it come  
12 naturally?

13 A. No, it did not. My natural shooting position, you're  
14 pulling everything into your body and locking your bone  
15 structure for support.

16 Q. And you'll agree with me that it is not a very accurate way  
17 to fire, isn't it?

18 A. Not particularly.

19 Q. Essentially you have to learn how to use a bump-stock in  
20 this fashion, don't you?

21 A. Yes, as you would learn any mechanical device.

22 Q. But it's not natural when -- at least according to what  
23 you're used to when you fire a weapon, isn't that fair?

24 A. Compared to most of the weapons I fire, that is correct.

25 Q. Okay. You're familiar with bump firing as a shooting

1 technique, right?

2 A. Yes, I am.

3 Q. And that's where someone is firing a semi-automatic weapon  
4 without a bump-stock, but they're simulating this kind of fire,  
5 right?

6 A. That is correct.

7 Q. Sometimes people use belt loops to do it, right?

8 A. Yes, sir.

9 Q. Where they'll hook their finger through a belt loop and  
10 then put the gun into the finger?

11 A. Yes, sir, typically when an individual is bump firing  
12 without some sort of accessory, they're finding some way to  
13 lock or hold their hand into a particular position, whether  
14 it's using a belt loop, whether they can just physically lock  
15 their arm enough and then by pressing forward on a secondary  
16 grip they're doing the same thing, they're allowing that weapon  
17 to bounce back and forth. They just don't have a stock for it  
18 to slide in. It's more difficult than using a bump-stock, but  
19 it can be done.

20 Q. And you can do it with no accessories, right? Some people  
21 can just fire a semi-automatic weapon like that?

22 A. Yes, sir.

23 Q. And they hold it loosely and they create the same  
24 separation with their finger and the trigger mechanism, right?

25 A. Yes, sir, typically they hold it away from their shoulder,

1 that way the weapon can recoil and not contact anything. As I  
2 said, you fix your trigger finger in place. You can do it  
3 physically if you've practiced it enough, just lock your arm  
4 and trigger finger in place and then again press forward on  
5 secondary grip. It will move the firearm into your trigger  
6 finger far enough that the trigger is pulled and it initiates  
7 the firing sequence. At which point again just like with the  
8 bump-stock recoil will move the entire receiver firearm  
9 assembly back. And by continuing to press forward, you get  
10 that bump back and forth allowing the mechanical trigger to  
11 reset continuing the firing sequence by pressing forward.

12 Q. And you'll agree with me that when someone is bump firing  
13 by hand, they're not pulling the trigger between each shot,  
14 right?

15 A. Correct. As I said, they're locking their finger in place,  
16 basically turning their finger into a post.

17 Q. Are you aware if the ATF has classified the act of bump  
18 firing as being a machine gun?

19 A. As far as I know, they have not.

20 Q. Mr. Smith, I have no further questions for you. Thank you  
21 very much.

22 THE COURT: Any redirect?

23 MR. SOSKIN: Your Honor, can I confer with opposing  
24 counsel?

25 THE COURT: Sure, of course.

1                   *(Discussion off the record.)*

2                   MR. SOSKIN: Your Honor, I just have a couple more  
3 questions for Mr. Smith. Before I make those questions, I did  
4 want to highlight for the Court that Plaintiff's Exhibit Two  
5 is, in fact, a part of the administrative record as described  
6 at page 17 of the brief we filed before trial. It is in the  
7 administrative record through a link at administrative record  
8 3318. So that video, Plaintiff's Exhibit Two, is properly a  
9 part of the administrative record in the case should the Court  
10 wish to refer to it.

11                  THE COURT: All right. Thank you.

12                  MR. SOSKIN: In addition, my colleague, Mr. Glover,  
13 had flagged for Your Honor the possibility that the parties  
14 might want to provide some argument on legal issues not covered  
15 by the testimony here. In light of what we have covered in  
16 today's testimony, plaintiff counsel and I discussed and we  
17 believe that if the Court has questions about any of those  
18 other legal issues, it might be appropriate to address those in  
19 another proceeding somewhere down the road rather than having  
20 disconnected argument today. And instead we would embrace your  
21 suggestion that we proceed to written closing argument.

22                  THE COURT: All right. Are you happy with that?

23                  MR. KRUCKENBERG: Yes, Your Honor.

24                  THE COURT: I don't want to force anybody. I'm  
25 willing to come back after lunch.



1 MR. KRUCKENBERG: No, Your Honor, I think what  
2 Mr. Soskin said makes a lot of sense. We certainly have the  
3 factual arguments that I think are amenable to the written  
4 closing.

5 THE COURT: Right.

6 MR. KRUCKENBERG: But then --

7 THE COURT: I would agree with you. I mean I don't  
8 see that there's a huge benefit to doing it, but I'm willing to  
9 allow you to.

10 MR. KRUCKENBERG: I agree.

11 THE COURT: He agrees. That's the bottom line.

12 REDIRECT EXAMINATION

13 BY MR. SOSKIN:

14 Q. Mr. Smith, I just have a couple more questions for you.  
15 Mr. Kruckenberg talked to you about the difficulty involved in  
16 firing a bump-stock, firing a semi-automatic equipped with a  
17 bump-stock. Do you recall that testimony?

18 A. Yes, sir.

19 Q. And he also asked you if you're familiar with bump fire  
20 without a bump-stock?

21 A. Yes, sir.

22 Q. Is firing a bump fire without a bump-stock something that  
23 you have also performed?

24 A. Yes, I have.

25 Q. And in your experience, how would you compare the level of

1 difficulty for bump firing with and without a bump-stock?

2 A. It is much more difficult to bump fire a weapon without a  
3 stock or without some sort of additional accessory compared to  
4 firing with a bump-stock.

5 Q. In Plaintiff's Exhibit Two, we looked at a Slide Fire model  
6 in which you could select to shoot semi-automatic fire as well  
7 as to bump fire. Do you recall looking at that in the video?

8 A. Yes, I do.

9 Q. What is the current model of M16 used by the military?

10 A. I know we're past the M16 A4, I don't know exactly which  
11 version they're using currently and it also depends on the  
12 service.

13 Q. There are various models of M16s the military has used over  
14 time, M16 A2, M16 A3, M16 A4, is that right?

15 A. Yes, sir.

16 Q. On those models is there a way to fire those models just as  
17 semi-automatic rifles?

18 A. Yes, the selector on M16 M4s allows you to have a safe  
19 function, a semi and a full auto or three-round verse depending  
20 on the model.

21 Q. So although an M16 of those models, an M16 A2, an M16 A4 is  
22 an automatic rifle, it has a semi-automatic firing mode, is  
23 that right?

24 A. Yes, it does.

25 MR. SOSKIN: Thank you, Mr. Smith. That's all I have.

1 MR. KRUCKENBERG: Nothing further, Your Honor.

2 THE COURT: All right. Thank you very much,  
3 Mr. Smith. You can step down.

4 THE WITNESS: Thank you, sir.

5 THE COURT: All right. I don't know that we ever got  
6 an answer from you about what you would like the Court to do or  
7 what your position is with respect to the matter of finding,  
8 legislative rather than regulatory, but I'm sure we'll hear  
9 about that in closing argument, okay, so remember it's due  
10 October the 1st. It will be simultaneously filed. We're not  
11 going to do a ping-pong thing here. There's no need for it in  
12 this case at all. Everybody knows what the issues are, you've  
13 all litigated this before extensively. I'm just one in a line  
14 of judges you've been before with this matter in different  
15 forums. If in going through the matter and after I have  
16 received your closing argument I am still concerned that I  
17 don't have all of -- I don't have complete clarity on what your  
18 various arguments are, I may, I may call you back for brief  
19 question and answer oral argument, if you will. I don't think  
20 I'm going to need to do that, but I just wanted to alert you to  
21 it. I am the last person in the world to think that I have all  
22 the answers. You have been working on these cases for a long  
23 time and you know them inside and out and I think any trial  
24 judge who tells you that they know your case better than you do  
25 either is delusional or there are really terrible lawyers in

1 the case. I'd like to think I'm not delusional and I know that  
2 the latter is not correct, you're all very good lawyers and  
3 I've enjoyed having you here. So there may be some issues here  
4 that I may need some further clarification on, I don't know. I  
5 have to read your closing argument. I think I pretty much  
6 understand where you're coming from, each of you. This is by  
7 no means an easy case. I mean, it isn't an easy case. It's  
8 one of these cases where when you first look at it you think,  
9 oh, I think I know how this should come out. Let's see. And  
10 then you get into it and you go wait a minute. It's like  
11 walking into a hall of mirrors, there's just a lot of facets to  
12 it and every time you look down one, you think you found your  
13 way out, you run into a wall and you've got to look over here.  
14 There are some cases that I've had where it's been pretty clear  
15 to me what the right answer was after I looked at the parties'  
16 documents. This is not one of those cases.

17 This is one of those cases where the legal issues  
18 and -- I mean, I understand how the bump-stock works, I  
19 understand how it works. That's not the problem. The problem  
20 is how does the bump-stock interplay with the definition of a  
21 machine gun. That's the crux of this case I think we would all  
22 agree, and that isn't so easy. Now, each side, of course,  
23 thinks, What is he talking about? Of course it's easy. We  
24 know what the answer is.

25 I once had a conversation with my late friend, Justice

1 Scalia, who used to come to Hawaii and he would come for the  
2 jurist residence program and he and I were on panels together  
3 and he had a great sense of humor and he used to say all the  
4 time, Yeah, everything is easy until you look at it and then  
5 maybe it isn't so easy.

6 So this is not an entirely easy case, I've got to look  
7 at it very carefully. I'll tell you my statement now will show  
8 you that I'm not delusional, all right. Unless between the  
9 time that I make my decision and the time for you to appeal,  
10 the Supreme Court issues a definitive ruling on this, this case  
11 will be appealed, okay, and I fully understand that. So I  
12 definitely need to make sure that I do the right thing here  
13 from my perspective, I always try to do that, but also do it in  
14 a way that makes it very clear to the Court of Appeals where I  
15 was coming from and why I ruled the way I did. And if they  
16 disagree with me, that's the system. That's the way it's  
17 supposed to work. I hope they would agree with me, but they  
18 may not, you know. And I don't think it means I'm a terrible  
19 judge. It means that they just disagree with me, I mean, what  
20 can I say? Okay, I think we can close the record.

21 (11:36 a.m.)

22 \* \* \*

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date signed: September 23, 2020

/s/ Angela M. Hailey

Angela M. Hailey, CSR, CRR, RPR, RMR  
Official Court Reporter  
655 East Cesar E. Chavez Blvd., Third Floor  
San Antonio, Texas 78206  
(210) 244-5048